

THE LAW OF EASEMENTS.

A
T R E A T I S E
ON
THE LAW OF EASEMENTS.

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WITH
THE NOTES OF
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BY
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PREFACE

TO THE FIFTH EDITION.

IN this Edition, as in the former, the text and Mr. Willes' notes are printed entire as in the Third Edition. The cases since decided, brought down to the present time, are inserted in additional notes. The last case referred to in the text is *Cartwright v. Last* (11 W. N. 60). Mr. Willes' notes are printed in double columns and referred to by letters thus (*a*); the present Editor's in lines running along the page and referred to by an asterisk (*).

The Author's plan is to state the principal cases at full length, Mr. Willes' merely to glance at them, referring to the same case repeatedly in different places, and backwards and forwards to his own notes. To appreciate his notes the reader should be a cleverer animal than Sir Boyle Roche's bird, and in more than two places at once. The present Editor's plan is intermediate,—to abridge each case, as far as possible to state it once only, and in its proper place. To have stated the cases as fully as Mr. Gale would have filled several volumes.

Railway directors in their half-yearly reports charm their shareholders by recounting the great numbers of passengers carried and miles run by their trains, and the small number and trifling nature of the accidents which have happened during the half-year. The Editor of an approved law work, which has passed through several editions, may be expected to give his readers analogous information. The First Edition of the present work was published in 1839; the Second in 1848; the Third, edited by Mr. Willes, in 1862; the Fourth, by the present Editor, in 1868. The present Edition contains 276 pages more than the First and 61 more than the Fourth; 268 new cases are cited, most of which have been decided since the last Edition, being an average of more than one a fortnight. A note has been inserted on rights in gross, licences and grants, which, though not Easements, resemble them; others, abridging the cases on the equitable title to Easements by agreement and acquiescence, those on grants in derogation of the right of support, those on the effect of Railway and Canal Acts on such rights, and on mischief by fire. The extraordinary cases by which the law has been changed, or attempted to be changed, are analogous to accidents, and noticed further on.

The learned Author, in the First Edition,

although he had before him Reports running over a period of more than 560 years, filling almost as many volumes, lamented the comparatively small number of decided cases on this branch of the law. It must gladden his heart to see the great number that have since been decided, though it may be with the result of creating rather than removing doubts.

The following review of the progress of the law between the Third and Fourth Editions was given in the Fourth Edition :—

“Considering the short time which has elapsed and the limited nature of the subject, the cases are both numerous and important. Extensive re-buildings, especially in London, have caused much litigation respecting the easement of light. The increase of houses and manufactories, and the improved system of drainage, have given rise to disputes about water supply and nuisances to air and water. The doctrine of the Author, that, on a conveyance of land, the grant of an easement from the purchaser to the vendor may be implied from the condition of the land at the time of the conveyance, called the disposition of the owner of two tenements, or by the more fanciful name of the destination of the father of a family, which derived some support from *Pyer v. Carter*, has been overruled. A passage in Comyns’ Digest, that a man may carry on his

trade in a convenient place, which had been misunderstood, has been explained and put on its proper footing, and in accordance with the opinion of Mr. Willes. The strange notion that a man building a wall with a window in it on his own land within view of his neighbour's, was a nuisance, and conferred on the neighbour the right of abating it by building on his land against the window, though in doing so he obstructed the light of another window to which an easement was appurtenant, has been exploded. A waterworks company endeavoured, by purchasing a licence from the owner of a few inches of land on the banks of a river, to acquire the right of drawing pure water from it for the supply of a town, to the prejudice of the use of the water by the other riparian proprietors. The Author treated incidentally of the Law of Negligence, principally with reference to the right of support for buildings by the adjacent land and buildings; and Mr. Willes, in a note, collected the cases on the subject of negligence in the use of land and fencing dangerous holes. Within the last six years there have been many disputed cases on this subject, and as it would have been unprofitable merely to give a catalogue of their names, a summary of the points decided by them has been stated."

Since then decisions have proceeded in much

the same current. The whirligig of time brings about its revenges. Doctrines which were at the bottom of the wheel yesterday are at the top to-day. *Pyer v. Carter* is again in favour, and Lord Westbury's disapproval of it disapproved. A new canon for the interpretation of deeds relating to Easements has been propounded. It has been said to be the duty of the judge to look only at the deed before him, and to decide the case according to his own opinion on the meaning of its words, without reference to the decisions of his predecessors on similar deeds, though he may afterwards look at them to see whether they do or do not correspond with the supreme intelligence of the last decider. On the subject of the Easement of light there are cases to meet every taste. The bar parlour of a public-house has been held only entitled to as much light as is necessary for the publican's business; a smoking room in a similar establishment has been more favourably dealt with. It has been held entitled to an absolute and indefeasible quantity of light. The prescription under Lord Tenterden's Act of an enjoyment for twenty years without interruption next before the commencement of the suit has received a remarkable interpretation. It has been held that a continuous interruption existing for more than a year before the commencement of the suit may be counted in the period of en-

joyment if protested against within the year. It follows that an interruption existing for nineteen or even twenty years before the commencement of the suit, if protested against once a year, may be reckoned as enjoyment, light constructively passing through the wall, like the kisses of Pyramus and Thisbe. In the case where this was decided there had been an uninterrupted enjoyment of light for twenty years, though not immediately preceding the suit. A prescription at Common Law might have been established or a lost grant presumed, but the judges who decided the case do not seem to have known this. There was a prior decision of an eminent equity judge directly to the contrary, and if the effect of the Judicature Act is to cause it to override the subsequent legal decision, the law may be none the worse.

The law of Easements illustrates the maxim that there is no rule without an exception. "*De minimis non curat lex*" is a well-recognized maxim or rule of law. The law of Easements proves that the law will sometimes take the greatest care of the smallest thing. A great master of Equity, while at one time saying he would only interfere where substantial damages had been sustained, as distinguished from a small sum, such as 5*l.* or 10*l.*, at another has granted an injunction where the damages re-

covered were a farthing. An Easement is rather a fringe to property than property itself. It may be acquired without the knowledge of the owner of the property charged and infringed by him quite unconscious of wrong. It is hardly possible to rebuild an old house in a narrow street without getting into that most uncertain of all litigations, a light and air suit, at the risk of costs greater than the value of the property.

The Easement of light in towns was founded on the most unreal of fictions. A grant was presumed not over vacant land but over the top of a house ; and because the owner of the servient house had not found it necessary to raise his house for twenty years, he was presumed to have entered into a covenant with his neighbour never to do so.

Lord Tenterden's Act has given great encouragement to this litigation. By a few words, apparently of course, at the end of the third section, but as full of meaning as an *et cetera* of Littleton or a shake of Lord Burleigh's head, it abolished in a moment, without notice, and without compensation, a valuable right of the owners of property in London and other cities, formerly walled, of building to any height on an ancient foundation ; and this at a time when, in London especially, it was becoming valuable. The houses there, mostly built after the Great Fire, were

falling into decay, and required rebuilding. By the repeal of the custom, those who had occasion to rebuild their houses and to rebuild them higher had to fight their way through a law suit or Chancery suit. The reports are full of cases,—cases at law, cases in Chancery, cases in the House of Lords,—arising out of the rebuilding of houses in the City of London; injunctions without end have been issued—and with what result? The houses prohibited have been built higher and larger than originally proposed. The plaintiffs and defendants whose names are recorded in the reports will live for ever in the memories of case lawyers, have ended their days in the workhouse, and the dominant and servient tenements passed to the solicitors and surveyors engaged in the litigations.

In treating of the law of negligence, into which the Author has diverged, the Editor has endeavoured not to go beyond the topics which the Author and the former Editor have opened, but only to treat them more fully and state the additional cases. This branch of the law presents some remarkable contrasts with the law of Easements. While litigants, who are willing and able to spend 20,000*l.* in quarrelling about twelve pennyworth of light, have been most hospitably received in the Courts of Law and Equity, in the cases of workmen who have lost their lives or

their limbs through negligence in the management of their master's machinery, exceptions have been introduced to many rules of law prevailing in other cases—exceptions to the law of bailments, to the law of privity, and to the law of infancy, to raise a barrier against the flood of litigation.

As to the law of bailments, it may be interesting to notice, that the first case as to the degree of care to be taken by the hirer of the thing hired was decided on the authority of the case of the duty of a father of a family to take care of the members of his family, *i. e.*, his children and servants. Men begat children and engaged servants (the child was the first servant), before they hired houses or furniture or cattle. Lord Holt, following the Roman lawyers, says that the hirer is bound to take the utmost care of the thing hired, such as *the most diligent father of a family uses*. No doubt the father of the family originally made the law by his own authority, prompted by his paternal feelings, but it was assented to by his children and servants. It was not the less a law, to be enforced, in case of need, by the judge. Does it make any difference that such need never arose until recent times? Law Reports and Law Treatises contain only cases on disputed points of law,—cases on the edge of the greater laws, about which

litigants quarrel and lawyers wrangle. There are laws which have always been obeyed and of which no trace is to be found in any law book. The law by which a father and master is bound to take care of his child and servant is one of them. The greater spirits knew it; the Roman lawyers knew it; Lord Holt knew it. It is a law which has prevailed and been obeyed from the foundation of the world to the birth of Christ, and for 1837 years afterwards, and for that reason has been disputed and denied. In the Happy Land, where they had no name for parricide, parricide was a crime, and there was a law against it; and the judges had no difficulty in dealing with the first parricide, though they did not know what to call him.

One authority has discovered that the law on this subject is not humane,—when he discovers it to be just he will rival Columbus.

When Lord Westbury brought forward his scheme for digesting the law, one of the subjects selected was the Law of Easements; and it may be that the elaborate and able manner in which the Author had treated the subject was the cause of this selection.

It is perhaps a happy omen that the scheme for digesting the law was not carried out. The Roman Law was digested when the Roman Empire was nodding to its fall. Compared with

the English Law it may be likened to a stately tower, built of the most solid materials, but gradually crumbling away; while the English Law resembles a living stream drawing its supplies from the mountains and the clouds; and though sometimes meandering, sometimes overflowing its banks, yet running on for ever, and as it runs becoming broader, and deeper, and stronger.

29th Feb. 1876.

ADVERTISEMENT
TO THE THIRD EDITION,
BY THE EDITOR.

It would be difficult to estimate too highly the value of the services which the learned Author rendered to the Profession by the production of the Treatise on Easements; services so well known and appreciated, that it is unnecessary to cite the many instances in which his work has been made the subject of praise by the highest authorities.

Most of the positions of the learned Author upon points upon which authorities were wanting, have been supported by the Courts of Law; and the instances are very few indeed in which subsequent decisions have required any modification in his statements of the law.

The additions made by the Editor have been marked with brackets. Readers who desire to refer to the former edition will find the old paging in the margin.

The Editor has to thank Mr. Thomas Edward Chitty, of the Inner Temple, one of the Editors of "Smith's Leading Cases," for a portion of the work, viz., the head "Negligence," in Part I., ch. 6, s. 4, and the heads "Disturbance" and "Remedies" in Part IV., containing the law as to the disturbance of Easements, and some observations upon the law of pleading peculiar to that subject, to add largely to which would have been inconsistent with the original design of the learned Author and the limits of the work.

W. H. W.

TEMPLE,
1st February, 1862.

PREFACE

TO THE SECOND EDITION.

THE favourable terms in which the First Edition of this work has been spoken of, by many whose voice on such subjects is authority, have permitted the Author to believe that some service has been rendered by presenting it to the Profession. He may be excused in referring with peculiar gratification to the approbation expressed of it by the late Lord Chief Justice Tindal, than whom no judge was ever more respected or regretted.

The introduction of the Civil Law, “the collective wisdom of ages,” into this treatise, has, it is believed, been found extremely useful; and, indeed, on this branch of our law the opinions of the civilians seem to be now almost adopted as authority (*a*).

(*a*) Vide per Lord Wynford in the Privy Council, *Benest v. Pison*, 1 Knapp, 69, post, 207, and the judgment of the Court of Exchequer Chamber in *Acton v. Blundell*, delivered by *Tindal*, C. J., post, 278.

A desire to remedy an admitted defect led to the passing of the Prescription Act—a statute, which has not only failed in effecting its particular object, but has introduced greater doubt and confusion than existed before its enactment. In fact, had it not been held, that the statute did not repeal the Common Law, many rights which have been enjoyed immemorially would have been put an end to by circumstances which never could have been intended to have that effect.

As in many other branches of the law of England, the earlier authorities upon the law of Easements appear to be based upon the Civil Law, modified, in some degree, probably, by a recognition of customs which existed among our Norman ancestors. The most remarkable instance of an adoption by the English Law from this source is the doctrine known in the French law by the title of “*Destination du père de famille*.”

In the majority of the cases, both ancient and modern, probably from a consideration of this being the origin of the law, recourse has been had for assistance to the Civil Law. It has, therefore, been considered that the utility of the work would be increased by the introduction of many of the provisions of that refined and elaborate system with respect to *Prædial Servitudes*, and the doctrine of Prescription; as well as some of

the observations of Pardessus—an eminent French writer on Servitudes.

With the same view the authority of decisions in the American Courts has been called in aid upon the subject of water-courses—questions which the value of water as a moving power, and the frequent absence of ancient appropriation, have often given rise to in the United States. In those judgments the law is considered with much care and research, and the rights of the parties settled with precision. The result of the authorities is stated by Chancellor Kent, in his well-known Commentaries, with his usual ability.

Upon many points, particularly upon the construction of the Prescription Act, the observations contained in the following pages are, in some degree, unsupported by direct authority. It has, however, been thought better to endeavour to open the law upon the doubts which presented themselves than to pass them over in silence.

TEMPLE,
July, 1839.

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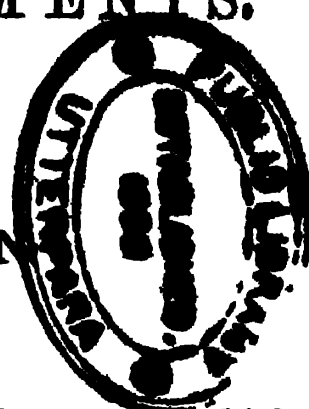
ADDENDA.

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- 16.—The judgment in *Cory v. Bristow* was reversed on appeal (1 C. P. D. 54). The reversal does not touch the point for which it is cited.
- 20.—In *Hall v. Nottingham* (1 Ex. D. 1), a custom for parishioners to erect a May-pole on land and dance round it was held good.
- 228.—The judgment of the House of Lords in *Swindon Waterworks v. Wilts & Berks Canal* is reported L. R., 7 H. of Lds. 697.
- 229.—*Lyon v. Fishmongers' Co.* is reported L. R., 10 Ch. 679.
- 357, 561.—In *Wimbledon and Putney Commons Conservators v. Dixon* (1 Ch. D. 862), it was held that a right of way to a farm used for all purposes could not be used to draw building materials to the dominant tenement on its being laid out as building land. (561)
- Also that a right of way over a common, where the terminus à quo and terminus ad quem were definite, was good, though dominant owner did not always use the same track. (357)
- 417.—In *Tarry v. Ashton* (11 W. N. 85), it was held that a man who has a lamp projecting over a highway is bound to maintain it so that it shall not be dangerous to passengers; and if a passenger is injured it is no excuse that he employed a competent person to repair it.
- 477.—*Wright v. London and North Western Railway Company* was affirmed on appeal (11 W. N. 14).
- 639.—In *Theed v. Debenham* (11 W. N. 92), *Bacon, V.-C.*, held that there was no positive rule as to the angle of forty-five degrees; and finding that a proposed building would cause a substantial diminution of light to the studio of the plaintiff, a sculptor, he granted an injunction, though it did not subtend to the angle of forty-five degrees.

TREATISE
ON THE
LAW OF EASEMENTS.

INTRODUCTION



IN addition to the ordinary rights of property, which are determined by the boundaries of a man's own soil, the law recognizes the existence of certain rights accessorial to those general rights, to be exercised over the property of his neighbour, and therefore imposing a burthen upon him.

That branch of these accessorial rights which confers merely a convenience to be exercised over the neighbouring land, without any participation in the profit of it, is called, by the law of England, Easements, as rights of way, and [acquired] rights to the passage of light and air and water (a). Those accessorial rights, which are accompanied with a participation in the profits of the neighbouring soil, are called Profits à prendre, as rights of pasture, or of digging sand.

Both these classes are comprehended under the Servitudes of the civil law. In treating of prædial Servi-

• (a) See p 3, note (c)

Introduction. tudes, no distinction is made between rights of this nature, whether accompanied or unaccompanied by a participation in the profits of the land (*b*).

The tenement to which the right is attached is called the dominant, that on which the burthen is imposed the servient tenement. The term servitude is used to express both the right and the obligation; the term easement generally expresses the right only. An easement differs from an obligation, inasmuch as it gives a right over the land of another, while an obligation gives a right only against the owner (*c*).

Origin of Easements.

The origin of some easements is as ancient as that of property—one tenement may be subjected to the convenience of another by the hand of nature itself—the inferior elevation of one, in relation to the other, may subject it to the fall of water from the higher ground. A similar disposition may be produced by the act of man permanently changing their previous relation, and thus affixing to them qualities with which they were not originally invested—as where, by the erection of buildings, water is discharged upon the neighbouring land, or light and air are received through a window. Other easements create no apparent change in the condition of the two tenements. but exist only by a repetition of the acts of man, as rights of way.

“The origin of servitudes,” says an eminent French writer, “is as ancient as that of property, of which they are a modification; by their natural disposition the inferior lands were placed in a species of dependence on those more elevated, and the first possessors of the

(*b*) *Inter rusticorum prædiorum servitutes quidam computari rectè putant, aquæ haustum, pecoris ad aquam adpulsum, jus pascendi,*

calcis coquendæ, arenæ fodiendæ.
—I. § 2, ff. de serv. præd.

(*c*) Merlin, *Répertoire de Jurisprudence*, tit. Servitude, p. 45.

“ soil recognized the indispensable necessity of such sub-
 “ jections. When the extension of cultivation brought
 “ men nearer together, and the want of a common
 “ defence formed the first society, public utility and
 “ safety led to the conviction, that it was necessary to
 “ restrict in certain cases rights legitimate in themselves,
 “ but the absolute exercise of which by individuals
 “ could not take place, without rendering some pro-
 “ perties almost valueless. In a short time similar
 “ rights were stipulated for by private persons, as
 “ matter of utility, or even pleasure. Thus, from the
 “ disposition of nature, the wants of society, and the
 “ agreements of individuals, have originated prædial
 “ servitudes ” (d).

[3]

By the law of England, the origin of rights of this kind is referred either to an express contract between the parties, or to a similar contract implied from the peculiar relation of the parties at the time they became possessed of their respective tenements, or from the long continued exercise of the right, from which a previous contract between them may be inferred (e).

(d) Pardessus, *Traité des Servitudes*.—S. 1.

[(e) The reader will observe hereafter that this work treats also of certain rights which exist as ordinary incidents of property, such as the right of support for the soil in its natural state, and the right of a riparian owner to the flow of a stream in its natural course. The similarity of such natural rights to those mentioned in the text, which have their origin in express or implied grants, is pointed out and their nature explained in the judgment of the Court of Exche-

quer Chamber in *Bonomi v. Backhouse*, E., B. & E. p. 653, and it is useless now to discuss the question, whether both classes of rights might not conveniently have been classed under one name, on the ground that all the land in England, according to the theory of our law (Co. Lit. 65 a), was originally derived from the sovereign, and that those natural rights above referred to might be considered to pass by implied grant, as negative servitudes “*ne facias*,” affecting the adjoining lands, as necessary for the enjoyment of the

Introduction. [See the judgment of Littledale, J., in *Moore v. Rawson*, 3 B. & C. 339.]

In like manner, by the civil law, the origin of servitudes was referred to “Lex, natura loci, vetustas” (*f*), which last, as in the English law, for the prevention of litigation, was allowed to confer a valid title.

[4] The number or modifications of rights of this kind may be infinite both in their extent and mode of enjoyment (*g*), as the convenience of man in using his property requires (*h*). “To descend now,” says Lord Stair, “to the kinds of servitudes, there may be as many as “there are ways whereby the liberty of a house or “tenement may be restrained, in favour of another “tenement; for liberty and servitude are contraries, “and the abatement of the one is the being or enlarging “of the other” (*i*).

land conveyed in its natural state upon the original division and every subsequent subdivision of the soil; the authorities having determined that such rights exist at common law wholly independent of any conveyance by one owner to another; see post, Part I. Ch. VI. Sections 1, 4, and the observations of *Wood, V.-C., North-Eastern Railway Company v. Elliott*, 29 L. J., C. 812; 1 J. & H. 145, S. C.]

(*f*) In summâ tria sunt per quæ inferior locus superiori servit. Lex, natura loci, vetustas, quæ semper pro lege habetur; minuendarum scilicet litium causâ.—L. 2, ff. de aq. et aq. pl. arc.; C. L. 2, ff. de longi temporis.

(*g*) Nullum est dubium, quin plures esse possint hujus generis servitutes, pro diversâ ratione ædificandi et habitantium necessitate.

—Heineccius, El. J. C. Lib. 8, § 148.

[(*h*) The placitum in the case of *Dyce v. Lady James Hay*, 1 Macqueen, Sc. Ap. 305, that there can be no prescriptive right in the nature of servitude or easement so large as to preclude the ordinary uses of property by the owner of the land affected, even where the right is such as might have been legally created by grant, has reference, not to ordinary servitudes or easements affecting one tenement in favour of another, but to that class of cases in which claims in the nature of easements are set up on behalf of large bodies of persons, as in the case quoted, where the claim was, in effect, of a right for the Queen’s subjects to use a close at all times for exercise and recreation. This class of cases will be found noticed infra, p. 20.]

(*i*) Institutes, book 2, tit. 7.

PART I.

OF THE ACQUISITION OF EASEMENTS.

CHAPTER I.

OF THE ESSENTIAL QUALITIES OF AN EASEMENT.

AN easement may be defined to be a privilege without profit, which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged “*to suffer or not to do*” something on his own land, for the advantage of the dominant owner (*a*).

The essential qualities of easements, properly so called (*b*), may be thus distinguished :—

- 1st. Easements are incorporeal.
- 2nd. They are imposed upon corporeal property.
- 3rd. They confer no right to a participation in the profits arising from it (*c*).
- 4th. They must be imposed for the benefit of corporeal property. [? See p. 9.]
- 5th. There must be two distinct tenements—the dominant, to which the right belongs; and the servient, upon which the obligation is imposed (*d*).*

(*a*) *Termes de la Ley*, tit. Easements. as distinguished from those which are directly profitable.”—Burton,

(*b*) See p. 7, note (*i*). Comp. ch. 6, § 3, art. 1165.]

[(*c*) “Rights of accommodation (*d*) See post, p. 13, note (*d*).”

* Adopted by the court in *Mounsey v. Ismay*, 3 H. & C. 497. Martin, B., delivering the judgment of the court, says, “one of the

ACQUISITION OF EASEMENTS.

6th. By the civil law, it was also required that the cause must be perpetual.

[6]

SECT. 1.—*Easements are incorporeal.*

“A right of way, or right of passage for water, where it does not create an interest in the land, is an incorporeal right, and stands upon the same footing with other incorporeal rights”(e).

Considered with regard to the servient tenement, an easement is but a charge or obligation, curtailing the ordinary rights of property (f):—with regard to the dominant tenement, it is a right accessory to these ordinary rights, constituting, in both cases, a new quality impressed upon the respective heritages (g).

(e) *Per Curiam* in *Hewlins v. Shippam*, 5 B. & C. 221; S. C. 7 D. & R. 783.

Servitutes prædiorum rusticorum, etiam si corporibus accedunt, incorporales tamen sunt.—L. 14, ff. de serv.

(f) Pertinent enim ad libera tenementa jura sicut et corpora,

jura sive servitutes, diversis respectibus: jura autem sive libertates dici poterunt ratione tenementorum quibus debentur.—Bracton, lib. 4, fol. 220 b.

(g) Quid aliud sunt jura prædiorum quam prædia qualiter se habentia? Ut bonitas, salubritas, amplitudo.—L. 86, ff. de v. s.

“earliest definitions of an easement with which we are acquainted is in the ‘Termes de la Ley,’ and it is ‘a privilege that one neighbour hath of another by writing or prescription without profit, as a way or a sink through his land.’ In this definition custom is not mentioned, prescription is; and it therefore seems to point to a privilege belonging to an individual, not to a custom which appertains to many as a class. Again, in Mr. Gale’s book, p. 5, an easement is defined, and a very great number of authorities are collected; and it is stated in the most explicit terms, that to constitute an easement there must be two tenements—a dominant one, to which the right belongs—and a servient one, on which the obligation is imposed.”

SECT. 2.—*Easements are imposed upon corporeal Property, and not upon the Person of the Owner of it.*

The right conferred by an easement attaches upon the soil of the servient tenement; the utmost extent of the obligation imposed upon the owner being not to alter the state of it, so as to interfere with the enjoyment of the easement (*h*) by the dominant.

The obligation upon him is in fact negative—to suffer or not to do—ceasing altogether upon his ceasing to be the owner of the servient heritage (*i*); and passing with the servient heritage, upon its transfer, to each successive proprietor (*k*).

So completely is this the case, that, if any disturbance of an easement has taken place previous to a transfer of the servient heritage, although such tortious act would

(*h*) *Taylor v. Whitehead*, 2 Doug. 749; and see *Pomfret v. Ricroft*, 1 Saund. 322; *Bullard v. Harrison*, 4 M. & S. 387. Vide post, Incidents of Easements.

In omnibus servitutibus reffectio ad eum pertinet qui sibi servitutem asserit, non ad eum cujus res servit.—L. 6, § 2, ff. si serv. vind.

(*i*) Aio esse jus, quo dominus aliquid pati in suo, aut in suo non facere, cogitur, ex naturâ omnium servitutum. Pati in suo, puta re suâ utentem, fruentem, per fundum suum euntem, agentem, aquamve ducentem, tignum in aedes suas immittentem. Non facere, veluti altiùs non ædificare, in suo non ponere quod luminibus aedium nostrarum aut prospectui officiat, &c. Planè enim ita servitus constitui non potest, ut quis aliquid cogatur

facere in suo; puta viridaria aut arbores prospectûs nostri causâ tollere, aut in suo pingere, quo amariorem nobis prospectum præstet, obligatio hæc erit, non servitus constituta; etideo, prædio alienato, non sequetur actio novum possessorem, ut fit ubi servitus constituta est; sed in eum, qui id facere promisit, hæredemque ejus, actio in personam dabitur in id scilicet, quod interest, si non fiat quod promissum est, ut accidit in omni obligatione faciendâ.—Vinnius, ad Inst. lib. 2, tit. 3; L. 15, § 1, ff. de serv.

(*k*) Non ignorabis, si priores possessores, aquam duci per prædia prohibere jure non potuerint, cum eodem onere perferendæ servitutis, transire ad emptores eadem prædia possè.—C. L. 3, ff. de serv. et aq.

give a right of action against the former owner, his successor is also liable if he allows it to continue (*l*).

SECT. 3.—*Easements confer no right to a participation in the Profits of the servient Tenement.*

Easements are specifically distinguished from other incorporeal hereditaments by the absence of all right to participate in the profits of the soil charged with them.

[8] The right to receive air, light, or water, passing across a neighbour's land, may be claimed as an easement, because the property in them remains common (*m*); but the right to take "something out of the soil" is a profit à prendre, and not an easement (*n*).

The servitude of the civil law had a much wider signification: comprehending, in addition to the easements proper of the English law, many rights which in it fall under the division of profits à prendre (*o*).

SECT. 4.—*Easements must be imposed for the beneficial Enjoyment of real corporeal* [? See p. 9] *Property.*

An easement, as such, can only be claimed as accessory to a tenement. This position was recognized as

(*l*) *Penruddock's case*, 5 Rep. 101; and post, Remedies for Disturbance.

[(*m*) Blackstone (Christian's), vol. ii. p. 18, and the judgment in *Race v. Ward*, 4 E. & B. 702, in which case it was held that the right to go upon a neighbour's land and take water out of a spring there is an easement and not a

profit à prendre.]

(*n*) *Manning v. Wasdale*, 5 A. & E. 764; S. C. 1 Nev. & P. 172; *Blewett v. Tregonning*, 3 A. & E. 554; S. C. 5 Nev. & Man. 308; *Bailey v. Appleyard*, 3 Nev. & Per. 257; 8 A. & E. 161, S. C.; [see *Race v. Ward*, 4 E. & B. ubi sup.]*

(*o*) Ante, p. 2, note (*b*).

law by the judges in a very early case (*p*). "Suppose," said Shars, J., "I grant to you a way over my land to a certain mill, and you are not seised of this mill at the time, but you purchase it afterwards: notwithstanding I disturb you in this way afterwards, you shall not have assize, though you may have a writ of covenant." To which it was replied, "In your case it is no marvel to me, although no assize lies, inasmuch as he had not the frank tenement to which he claimed to have (*dut avoir*) the way, at the time the way was granted to him, and therefore he could not have had assize if he had been disturbed at the time when the grant was made; and as he could not then have assize, the purchase of the frank tenement afterwards would not enable him to maintain this action."

[9]

[There appears to be no authority for saying that an easement may not be claimed as accessory to an incorporeal hereditament, as, for instance, if the owner of a right to take certain minerals(*q*) under close A., obtained a grant from the owner of an adjacent close, B., of a way over the close B., or a right to discharge water over it for him, his heirs and assigns, as appurtenant to the right of mining, it is believed that an easement would be created and would be appurtenant to the incorporeal right already vested in the grantee.

It is clear, that if the grantee, in the case above supposed, was already the owner not merely of the incorporeal hereditament, but owner of the substratum itself containing the minerals, and obtained such a grant from

(*p*) 21 Edw. 3, 2, pl. 5.

(*q*) The right to take minerals out of the soil of another is an incorporeal right, the right to a stratum of minerals is a corporeal

right. *Parke, B., Wilkinson v. Proud*, 11 M. & W. 40; *Duke of Hamilton v. Graham*, L. R., 2 H. Lds. Sc. 166.

the owner of B., that he would thus become entitled to an easement appurtenant to his soil, and what reason is there for holding that such would not also be the result in the case first put? It is true, there are authorities to be found in general terms, that a thing incorporeal cannot be appurtenant to another incorporeal; but this, as pointed out in the notes to Co. Litt. 121 b, note 7 (Hargrave and Butler's edition), is by no means an universal rule. The true test, as there mentioned, is the propriety of relation between the principal and the adjunct, which may be found out by considering whether they so agree in nature and quality as to be capable of union without incongruity, and the supposed case perfectly stands this test. If the question were raised in the form above suggested, the difficulty could not be evaded by holding that the first incorporeal right is enlarged by the grant of the second, and that both together form one entire right, as they would do if they had originally been conferred by the same grantor in one grant. Upon the question itself see the case of *Rowbotham v. Wilson* (r).]

“Nullus hujusmodi servitutes,” says Bracton, “constituere potest, nisi ille, qui fundum habet et tenementum; quia prædiorum, aliud liberum, aliud servituti superpositum (s).”

“Et ita pertinent servitutes alicui fundo ex constitutione sive ex impositione de voluntate dominorum” (t).

Thus it has been recently intimated on high authority,

(r) 8 H. of L. 348.

(s) Lib. 4, f. 220 b.

(t) Idem, f. 221 a. Quoties nec hominum, nec prædiorum, servitutes sunt, quia nihil vicinorum interest, non valet; veluti ne per fundum tuum eas, aut ibi consistes,

et ideo si mihi concedas jus tibi non esse fundo tuo uti, frui, nihil agitur; aliter atque si concedas mihi jus tibi non esse in fundo tuo aquam quærere, minuendæ meæ aquæ gratiâ.—L. 15, ff. de serv.

that a plea to turn cattle on land generally, without stating for what purpose, is bad (*u*). Probably, however, in the English as in the civil law, the grant of an easement in respect of a house about to be purchased, or built, by the grantee, would enure as such. [11] [A familiar example of this is the case of a conveyance, by a landowner, of part of his land for the express purpose of building a house, in which case the land which he retains becomes affected by an easement of support for the house when built. "If the grant is made expressly to enable the grantee to build a house on the land granted, there is an implied warranty of support, subjacent and adjacent, as if the house had already existed" (*x*). And it would no doubt be held in the case of a grant affecting a tenement with an easement in favour of a tenement, supposed to belong but not really belonging to the grantee at the time of the grant, that upon the grantee subsequently acquiring the tenement this grant would become effectual, but this is more properly a part of the law of estoppel.

(*u*) Per Littledale, J., *Bailey v. Appleyard*, 3 Nev. & Per. 257; [8 A. & E. 161, S. C.; but all that the learned judge meant was, that it must be shown by proper averments in pleading in what respect the right to enter arises (see per Maule, J., in *Peter v. Daniel*, 5 C. B. 577); he could not have intended that a plea of a right of common in gross would be bad, for it is clear that such a right may exist, and that a man may claim to be entitled, by grant or by prescription, to a right of pasture in gross, giving to him and his heirs, independently of the possession of

any land by them, the right of turning a definite number of cattle upon the land over which the right of common is claimed. See Christian's Blackstone, vol. ii. p. 33; *Welcome v. Upton*, 6 M. & W. 543.]

[(*x*) Per Lord Chancellor in *Caledonian Railway Company v. Sprot*, 2 Macq. S. A. 453; and see post, Part I. Chap. VI. Sect. 4. If the purpose is expressed directly or by reference in the grant, a legal easement would be created; if it is not so expressed, but was so intended, the remedy would be in Chancery.]

(See the observations of Lord Wensleydale, in *Rowbotham v. Wilson*, 8 H. of L. p. 364, upon a kindred point.)]

By the civil law, although it was clearly established that a servitude could be acquired only by the proprietor of the heritage to be benefited by it (*y*); yet where, at the date of the grant, there was an intention to erect the building to which the servitude was to be attached, the right so conferred was valid (*z*).

It followed from this rule that every servitude must be productive of advantage to the dominant tenement. A mere restriction upon the rights of the servient owner was invalid, if unaccompanied by any benefit to the dominant owner, or if such benefit were merely a personal one to him (*a*).

For the same reason no servitude could exist, unless the dominant and servient tenements were sufficiently near, to allow the one to receive a benefit from the subjection of the other (*b*).

(*y*) Nemo enim potest servitutem acquirere, urbani vel rustici prædii, nisi qui habet prædium.—L. § 3, ff. de serv. præd.

(*z*) Futuro ædificio, quod nondum est, vel imponi vel acquiri servitus potest.—L. 23, § 1, ff. de serv. præd.

(*a*) Ut pomum decerpere liceat, et ut spatium, et ut cœnare in alienâ possimus, servitus imponi non potest.—L. 8. Ibid.

(*b*) Quod si ædes meæ a tuis ædibus tantum distant ut prospici non possint; aut medius montium conspectum auferat, servitus imponi non potest.—L. 38, ff. de serv. urb. præd.

Nemo enim propriis ædificiis servitutem imponere potest, nisi et is qui cedit, et is cui ceditur, in conspectu habeant ea ædificia, ita ut officere alterum alteri potest.—L. 36. Ibid.

Neratius libris ex Plantio ait: nec haustum pecoris, nec appulsum, nec cretæ eximendæ, calcisque coquendæ, jus posse in alieno esse, nisi fundum vicinum habeat; et, hoc Proculum et Attilianum existimasse, ait.—L. 5, § 1, ff. de serv. præd. rust.

In rusticis autem prædiis impedit servitutem medium prædium quod non servit.—L. 7. Ibid.

The servitude, when once acquired, passed with the heritage into the hands of each successive owner (c).

Many personal rights, which, in their mode of enjoyment, bear a great resemblance to easements, as, for instance, rights of way, may be conferred by actual grant, independently of the possession of any tenement by the grantee; but such rights, though valid between the contracting parties, do not possess the incidents of an easement. In case of disturbance of a personal right thus given, the remedy would appear to be upon the contract only (d).*

(c) Si fundus serviens, vel is cui servitus debetur, publicaretur, utroque casu durant servitutes; quia cum suâ conditione quisque fundus publicaretur.—L. 23, § 2, ff. de serv. præd. rust.

Cum fundus fundo servit, vendito quoque fundo, servitutes sequuntur.—L. 12, ff. comm. præd.

[(d) It may be questioned, however, whether the owner of an easement in gross would not have the same remedies which he would have if it were appurtenant; a right of common or other profit à prendre may be claimed as a

right in gross (see note (u), ante, p. 11), and there should seem to be no reason why an incorporeal right, not involving participation in the profits of the servient tenement, should not be capable of being conferred in like manner with an incorporeal right involving such participation. The case of *Ackroyd v. Smith*, 10 C. B. 164, is not inconsistent with this position. The point decided by that case is, that a right of way cannot be so granted as to pass to the successive owners of land as such, in cases where the way is

* “There can be no easement, properly so called, unless there be both a servient and a dominant tenement. It is true that in the well-known case of *Doraston v. Payne* (2 H. Bl. 527), Mr. Justice Heath is reported to have said, with regard to a public highway, that the freehold continued in the owner of the adjoining land, subject to an easement in favour of the public; and that expression has occasionally been repeated since that time. That, however, is hardly an accurate expression. There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement. In truth, a public road or highway is not an easement. It is a dedication to the public of the occupation of the surface of the land for the purpose of

Easements in gross.

not connected in some manner with the enjoyment of the land to which it is attempted to make it appurtenant; in fact the grant in that case is an instance of an attempt to create a new kind of estate, a right of way at the same time in gross and appurtenant: in gross in that it was in fact unconnected with *the enjoyment of the land* to which it was attempted to make it appurtenant, and appurtenant in that the grant purported to limit it so as to go to the successive owners of that land in succession. This attempt of course failed, but the case does not affect the position, that as profits à prendre may be claimed in gross, so also mere easements may be claimed in gross, and that such right may

be accompanied with all the same remedies as easements appurtenant, and that the burden of them may run with the tenement over which they are claimed. Lord St. Leonards, in 1 Macqueen, S. A. p. 312, expressly laid down that a dominant tenement is not necessary for the existence of an easement according to the English law, and some of the cases quoted post, p. 20, are instances to show that the existence of easements in gross is recognized by that law. The present treatise, however, is confined to those which are accessory to tenements. See post, Part I. Ch. V. Sect. 1, upon the question whether such an easement would be within Lord Tenterden's Act.]

passing and repassing, the public generally taking upon themselves (through the parochial authorities or otherwise) the obligation of repairing it. It is quite clear that that is a very different thing from an ordinary easement, where the occupation remains in the owner of the servient tenement subject to the easement." (Per Lord Cairns, L. J., *Ranglecy v. Midland Rail. Co.*, L. R., 3 Ch. 310.)

No right can be annexed to a house or land which is unconnected with the enjoyment or occupation thereof (*Ellis v. Mayor of Bridgnorth*, 15 C. B., N. S. 78; 2 Notes to Saunders, 727), or larger than required for such use or enjoyment. Thus a right of way for all purposes, including purposes unconnected with the enjoyment of the land, cannot be claimed as appurtenant to land (*Ackroyd v. Smith*, 10 C. B. 164); nor can an occupier of one close of land claim a right to take all the trees and wood growing on another close as appurtenant to his land. (*Bailey v. Stephens*, 12 C. B., N. S. 91.)

In the following cases questions were raised as to whether the easements granted were appurtenant to land.

Ellis v. Mayor of Bridgnorth.

Ellis v. Mayor of Bridgnorth (15 C. B., N. S. 52). A market had from time immemorial been held in the street of Bridgnorth before the plaintiff's house, and he claimed the right to have a stall on market days before his house. The defendants removed the market, and he sued them for the disturbance of his right. The court held that the

right was probably conferred in consideration that the holding the market must necessarily diminish on market days the trade of the shops, and the shopkeepers were therefore privileged to advance their shops into the market, and that the enjoyment of the stalls by them was sufficiently connected with the enjoyment of land to satisfy the rule of law acted upon in *Ackroyd v. Smith* and *Bailey v. Stephens*, and that, as the right originated in a grant from the owners of the market, their successors could not derogate from that grant by changing the site of the market-place.

Thorpe v. Brumfitt (L. R., 8 Ch. 650). Pollard was the owner of an inn; Morrell granted him a piece of land adjoining the inn-yard and a right of way for all purposes through and along a certain road between the piece of land conveyed and a street. The Lords Justices held that it was a way appurtenant to the land conveyed and not a right in gross, and therefore was assignable; and construing the grant reasonably, it meant a right of way between the highway and the yard of the inn, the angular piece of ground not being intended to be held as a separate tenement, but being granted only for the purpose of being thrown into the yard, so as to make it a more convenient boundary line between the properties of the grantors and grantees. Mellish, L. J., observed that, in *Ackroyd v. Smith*, the close to which it was sought to make the way appendant was not at the end of the road.

On this subject a distinction should be noted between a licence and an easement and a licence and a grant. A licence is personal between the grantor and grantee, an easement annexed to land. "A licence properly passes no interest, but only makes an action lawful which without it was unlawful: as a licence to go beyond seas, to hunt in a man's park or to come into his house, are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park and carry away the deer killed to his own use, or cut down a tree and carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down; but as to carrying away the deer killed and the tree cut down, they are grants." (*Thomas v. Sorrell*, Vaugh. 351, cited per Tindal, C. J., 5 Bing. N. C. 707.) A grant to a man and his assigns carries an interest which may be assigned. A licence to search and get minerals and carry away the ore found is assignable (*Muskett v. Hill*, 5 Bing. N. C. 694), and a right of sole and several pasturage in gross may be claimed by prescription and is assignable. (*Welcome v. Upton*, 6 M. & W. 536). A grant of a right of way not appurtenant to land operates as a mere personal licence, and is not assignable (*Ackroyd v. Smith*, 10 C. B. 164); it confers no right in the land to the grantee, but operates only as a contract between the grantor and grantee. Thus, the grantee of the exclusive privilege of having pleasure boats on a canal cannot sue a stranger for the infringe-

SECT. 5.—*There must be two distinct Tenements—the dominant, to which the right belongs—and the servient, upon which the obligation is imposed.*

It is obvious, that if the dominant and servient tenements are the property of the same owner, the exercise

ment of his right. (*Hill v. Tupper*, 2 H. & C. 121). A grant exceeding the powers of the grantor is within the same rule. Thus, a Waterworks company who claim a right to take water from the river under a grant from a riparian proprietor cannot sue another proprietor for fouling the water of the river. (*Stockport Waterworks Co. v. Potter*, 3 H. & C. 300.) And where the purchaser of copyhold land covenanted that the vendor might work mines in his adjoining freehold land without being liable to make compensation for injury to the surface of the copyhold, but the deed was not entered on the court rolls nor known to the lord of the manor, a subsequent owner of the copyhold who had enfranchised it was held not bound by the deed. The majority of the court, Martin, Channell and Pigott, BB., were prepared to decide that the case would have been the same had both lands been freehold; but Pollock, C. B., dissented from this view. (*Richards v. Harper*, L. R., 1 Ex. 199.)

As a licence to enter or occupy land not amounting to a lease conveys no interest in land, it is not within the 4th section of the Statute of Frauds; and the licence, or an agreement for it, need not be in writing. (*Jones v. Flint*, 10 A. & E. 753; *Wright v. Stavert*, 2 E. & E. 721.) The licensee is not an occupier of the land, and cannot be rated to the relief of the poor. (*Watkins v. Milton*, L. R., 3 Q. B. 350: case of a barge licensed to be moored in the river.) Blackburn, J., puts the case of a lodger in the same category. (*Secfry v. Briston*, L. R., 10 C. P. 504.) A simple licence to be irrevocable by the licensor must be under seal. If it is not, the licensee is not a trespasser until the licensor revokes his licence. Under a parol licence the licensee has a reasonable time to go off the land after it has been withdrawn, and to remove his goods which he has been licensed to place there. (*Cornish v. Stubbs*, L. R., 5 C. P. 334; *Mellor v. Watkins*, L. R., 9 Q. B. 400.) It is not binding on the assignee of the licensor. (*Roffey v. Henderson*, 17 Q. B. 574: case of a licensee to remove fixtures. *Coleman v. Foster*, 1 H. & N. 37: ticket to admit to a play.) A licence annexed by law as an incident to a grant is binding on the assignee of the licensor, as when trees growing on land are sold, and the land is afterwards sold, the vendee may go on the land to take away the trees. (Bro. Abr. *Trespass*, pl. 400; 7 Bac. Abr. 676, *Trespass*, F. 1.)

of the right which in other cases would be the subject of an easement, is, during the continuance of his ownership, one of the ordinary rights of property only, which he may vary or determine at pleasure, without in any way increasing or diminishing those rights.

It is therefore essential that the dominant and servient tenements should belong to different owners: immediately they become the property of the same person the inferior right of easement is merged in the higher title of ownership (*e*).

This principle is thus laid down by Bracton: "*Nemini servire potest fundus suus proprius, quia prædiorum, aliud liberum, aliud servituti suppositum*" (*f*).

"*Et talis dici poterit constitutio quâ domus domui, rus ruri, fundus fundo, tenementum tenemento, subjungatur: et non tantum personæ per se, vel tenementum per se, sed uterque simul, tam tenementum, quam personæ*" (*g*).

"A servitude is a charge imposed upon one heritage for the use and advantage of an heritage belonging to another proprietor" (*h*).

(*e*) *Holmes v. Goring*, 9 Bing 83; S. C. 9 Moore, 166. ["Where there is a unity of seisin of the land, and of the way over the land, in one person, the right of way is either extinguished or suspended according to the duration of the respective estates in the land and the way." Judgment in Cam. Sence., 4 A. & E. 761.] Nulli enim res

sua servit.—L. 26, ff. de serv. præd. Si quis ædes quæ suis ædibus servirent cum emisset, traditas sibi accepit, confusa sublataque servitus est.—L. 30, ff. de serv. præd. urb.

(*f*) Lib. 4, f. 220.

(*g*) Ibid. f. 221.

(*h*) Code Civil, art. 63

[12] SECT. 6.—*By the Civil Law the causes of Easements must be perpetual.*

It is not to be understood by this position that the civil law required the enjoyment of an easement to be continuous and necessarily perpetual, conditions which in many cases would be obviously impossible (*i*); but only that the qualities thus impressed upon the dominant and servient tenements should be in their nature permanent, and such as were capable of continuing in their present condition for an indefinite period (*k*).

If from the nature of the servient tenement the enjoyment can only continue during a limited space of time, as where water is drawn from a mere artificial collection, no servitude was acquired (*l*).

The want of direct authority upon this point in the law of England (*m*), renders it difficult to determine to what extent this principle is admitted by it; and even in the civil law it is by no means easy to define the rule

(*i*) Tales sunt servitutes, ut non habeant certam continuamque possessionem; quia nemo tam continenter ire potest, ut nullo momento possessio ejus interpellari videatur.—L. 14, ff. de serv.

(*k*) Omnes servitutes prædiorum perpetuas causas habere debent; et ideo, neque ex lacu, neque ex stagno, concedi aquæ ductus potest.—L. 28, ff. de serv. urb. præd.

Servitus aquæ ducendæ, vel hauriendæ, nisi ex capite, vel ex fonte constitui non potest.—L. 9, ff. de serv. præd. rust.

Stillicidii quoque immittendi, naturalis et perpetua causa esse

debet.—L. 28, ff. de serv. præd. urb.

(*l*) Foramen in imo pariete conclavis vel trielinii quod esset proluendi pavimenti causâ, id neque flumen esse, neque tempore acquiri, placuit. Hoc ita verum est si in eum locum nihil ex cœlo aquæ veniat: neque enim perpetuam causam habet, quod manu fit; at quod ex cœlo cadit, et si non assiduè fit, ex naturali tamen causâ fit, et ideo perpetuo fieri existimatur.—Ibid

[(*m*) See upon this subject the cases cited post, Part I. Chap. VI. Sect. 1, which supply the want pointed out by the Author.]

with precision; for though it is there laid down that nothing which depended upon the mere act of man (*quod manu fit*), as a discharge through an aperture in the wall of water used in washing the pavement, could constitute a servitude, it seems clear that a servitude might be acquired to discharge smoke and steam arising from hot baths, the use of which would obviously be of equally uncertain duration, and arising directly from the hand of man (*n*).

[13]

The rule laid down by Vinnius is, "That a servitude has a perpetual cause where it is natural, though not constant, as rain water, which falls naturally, though not constantly; and that those servitudes which arise by the act of man have also a perpetual cause, if the tenement, or any part of it, has been adapted or prepared (*parata*) for its enjoyment, as the immission of smoke" (*o*).

It is obvious, however, that it is difficult to reconcile this rule with the instance above cited from the Digest, unless the aperture there mentioned be considered as made for a temporary purpose only.

Bracton appears to have recognized this as an essential element: after laying it down that a man may have an

(*n*) *Nam et in balineis inquit vaporibus, cum Quintilla cuniculum pergentem in Ursi Julii instruxisset, placuit, potuisse tales servitudes imponi.—L. 8, § 7, ff. si serv. vind.* [The observation in the text also applies to a right of sewerage, which, according to the civil law, may constitute a valid servitude.—*L. 7, ff. de serv.*]

(*o*) *Perpetuum illis est quod-*

cumque ex naturali causâ oritur etsi non sit assiduum, ut ecce, aqua pluvia ex naturali causâ oritur, etsi non assidue pluit; quod enim naturaliter fit, perpetuum videtur, licet non fiat assidue, ut defectio lunæ. Sed et quod ex facto nostro oritur, perpetuum habetur, si ejus causâ prædium aut pars prædii parata est, ut fumi immissio.—Vinnius, ad Inst. lib. 2, tit. 3.

assize for disturbance of his "haustus aquæ" he continues,

"Sed hoc (breve) non est de cisternâ, quia cisterna non habet aquam perpetuam, nec aquam vivam, quia cisterna imbris concipitur" (*p*).

[14] There are many rights which in their mode of enjoyment partake of the character of easements: as, however, the existence and validity of these rights [generally] depend upon some local custom, excluding the operation of the general rules of law (*consuetudo tollit communem legem*) (*q*), and as they are sometimes entirely independent of any express or implied agreement between the parties (*r*), they generally stand upon a different footing and are not in all respects governed by the same principles as those which determine the boundaries of private easements (*s*).

(*p*) Lib 4. f. 233.

(*q*) Le case de Tanistry, *Davis*, 31 (*b*), 32 (*a*); Co. Litt. 33 b, 113 b; 1 Roll. Abr. Custom C. 558. Vide per Curiam in *Tyson v. Smith*, Ex. Ch., 9 A. & E. 421.

(*r*) *Blwitt v. Tregonning*, 3 A. & E. 554. [The custom comes at last to an agreement, which has been evidenced by such repeated acts of assent * * * that it has become the law of the particular place. Judgment in *Tyson v. Smith*, ubi sup.]

(*s*) Instances of such rights will be found in *Race v. Ward*, 4 E. & B. 702, of a custom for the inhabitants of a township to go on a close and take water from a

spring; *Tyson v. Smith*, 6 A. & E. 745; 9 A. & E. 406; of a custom for liege subjects exercising the trade of victuallers to erect booths on the waste of a manor at the time of fairs; *Abbot v. Weekly*, 1 Lev. 176; of a custom for the inhabitants of a vill to dawe upon a particular close; *Warrick v. Queen's College*, L. R., 10 Eq. 129. When, however, claims of this kind are unreasonable in their character they are disallowed, even in cases where they might possibly have formed the subject of a valid grant (see the judgment of the Lord Chancellor in *Dyce v. Lady James Hay*, 1 Macqueen, S. A. 305);*

* *Blackett v. Bradley*, 1 B. & S. 940; *Sowerby v. Coleman*, L. R., 2 Ex. 96.

but no question of a similar kind can arise in the case of a private easement, involving only *the rights of the owner of the dominant tenement on the one hand and the servient on the other*, for in such a case, if the circumstances are such that the right claimed could have been the subject-matter of a valid grant as an easement, its existence may be established by proof of user, and no valid objection can be taken on the

ground of the extent to which it may interfere with the enjoyment of the servient tenement. For the principles upon which the unreasonableness of a custom is to be determined, see the judgment of the Court of Exchequer Chamber in *Tyson v. Smith*, ubi sup., and an elaborate review of the authorities in the judgments delivered in the House of Lords in *Marquis of Salisbury v. Gladstone*, 9 H. of L. 692.*

* Of this nature is a custom for the freemen and citizens of a town to have horse races on the land of an individual on Ascension Day in every year. (*Mounsey v. Ismay*, 1 H. & C. 729.) Such a custom is not an easement, and cannot be claimed under the Prescription Act. (*Mounsey v. Ismay*, 3 H. & C. 486.) A customary right of this sort is only applicable to the inhabitants of a certain district, and cannot be claimed on behalf of the public at large. (*Earl of Coventry v. Wiles*, 9 L. T., N. S. 384.)

CHAPTER II.

SUBJECTS OF EASEMENTS.



Affirmative
and negative.

FROM the civil law may be taken a practically useful division of easements into two principal classes, which may be termed affirmative and negative. Those coming under the head of affirmative easements authorize the commission of acts which, in their very inception, are positively injurious to another--as a right of way across a neighbour's land, or a right to discharge water--every exercise of which rights may be the subject of an action. Negative easements are injuries consequentially only--restricting the owner of the soil in the exercise of the natural rights of property--as where he is prevented building on his own land to the obstruction of lights. With respect to this latter class, it is evident that no cause of action can arise from their exercise; they can be opposed only by an obstruction to their enjoyment.

It has already been observed, that the number and variety of these rights are almost infinite, according to the exigencies of domestic convenience, or the different purposes to which land or buildings may be appropriated.

[16]

The English law furnishes the following amongst Affirmative. other instances of affirmative easements:—

Rights of way.

[Right to make surface uneven by working mines in such manner as to let it down (*a*).

Right to go on soil of another to clear a mill stream and repair its banks. Lord Campbell in *Beeston v. Weate* (*b*); *Peter v. Daniel* (*c*).

Right to go on a neighbour's close, and draw water from a spring there. *Race v. Ward* (*d*).

The right to conduct water across a neighbour's land by an artificial watercourse, and to go upon that land for purpose of turning the water into the same. *Beeston v. Weate* (*e*).

Right to discharge water or other matter on to a neighbour's land.]

Right to discharge rain-water by a spout or projecting eaves.

[Right to use or to affect water of natural stream in any manner not justified by natural right.]

Right to support from a neighbouring wall.*

[(*a*) In *Ronbotham v. Wilson*, 8 H. of L. 362, it is laid down that such an easement may be granted to the owner of a stratum of minerals. It should seem that it might also be granted to the owner of a right to take minerals in alieno

solo; see ante, p. 9, note (*q*), as to the distinction.]

(*b*) [5 E. & B. 996.

(*c*) 5 C. B. 568.

(*d*) 4 E. & B. 702.

(*e*) 5 E. & B. 986.]

* A right to drive a pile into the bed of a river for the more convenient use and enjoyment of a wharf (*Lancaster v. Eas*, 5 C. B., N. S. 717); a right to a fender in a mill stream to prevent a waste of water (*Wood v. Hewett*, 8 Q. B. 913); a right to have a name plate on a door (*Lane v. Dixon*, 3 C. B. 776); a right to have a sign post on a common before a public-house (*Hoare v. Metropolitan Board of Works*, L. R., 9 Q. B. 206).

Right to carry on an offensive trade.

Right to hang clothes on lines passing over the neighbouring soil (*f*).

[Right to make spoil banks upon surface in course of working minerals. See *Rogers v. Taylor* (*g*).]

[Right to use close for purpose of mixing muck and preparing manure there for an adjoining farm. See *Pye v. Mumford* (*h*), where the pleader claimed the right as a profit à prendre.]

Right to bury in a particular vault (*i*).

[Right to pew in a church. See Best on Presumptions, p. 111.*]

The principal negative easements are:—

Negative.

[Acquired] right to receive light and air by windows.

[Acquired] right to support of neighbouring soil (*k*).

[The right to receive a flow of water of a natural stream was formerly included in this class, but

(*f*) *Drenell v. Towler*, 3 B. & Ad. 735.

[(*g*) 1 H. & N. 706.†]

(*h*) 11 Q. B. 666.]

(*i*) *Danney v. Dee*, Cro. Jac. 604; *Bryan v. Whistler*, 8 B. & C. 288; S. C. 2 Man. & Ry. 318.

[(*k*) 'The learned author stated, in the 2nd edit. of this work, at p. 216, that the right of support of neighbouring soil for land not incumbered by buildings, is not an easement, and the subsequent decisions show that his view was

well founded, and that such a right is an ordinary right of property and not an easement; see the cases cited Part I. Ch. VI. Sect. 4. The present work treats as well of such natural right as of that which is acquired by grant or user, but the passage in the text applies of course to the latter only, the character of which when acquired is like that of the natural right; judgment in *Bonomi v. Backhouse*, E., B. & E. 655.]

* *Hinde v. Charlton*, L. R., 2 C. P. 104; *Brumfitt v. Roberts*, L. R., 5 C. P. 224; *Greenway v. Hockin*, L. R., 5 C. P. 235.

† *Earl of Cardigan v. Armitage*, 2 B. & C. 197.

the cases cited post, Part I. Chap. VI. Sect. 1. decide that it is an ordinary right of property and not an easement.]

Easements may also be divided into continuous and discontinuous, and into apparent and non-apparent. Continuous and discontinuous.

“Continuous servitudes are those of which the enjoyment is or may be continual, without the necessity of any actual interference by man, as a waterspout, or right to light and air.

“Discontinuous servitudes are those the enjoyment of which can only be had by the interference of man, as rights of way, or a right to draw water” (l).

“Apparent servitudes are those the existence of which is shown by external works (*ouvrages extérieurs*), as a door, a window, a watercourse. Apparent and non-apparent. [17]

“Non-apparent servitudes are those which have no external sign of their existence; as the prohibition to build on particular land, or to build above a certain height” (m).

This illustration of a “door” seems inexact. By “sign apparent” appears to be meant not merely some visible indication of the intention to use an easement, but some permanent change of one or other of the tenements, indicating that one is subjected necessarily to the convenience of the other. A “door,” considered as an opening for the use of a right of way, would not satisfy this condition. [See post, Part I. Chap. IV. Sects. 1, 2.]

“There are,” says Merlin, “some servitudes, which are called non-apparent (*cachées*), which manifest themselves by an exterior sign; as, for example, where I have a right of way in the court or garden of my

(l) Code Civil, art. 688.

(m) Code Civil, art. 689.

neighbour, and I have a door which announces this right of way" (*n*).

Urban and
rustic servi-
tudes.

The leading division of prædial servitudes in the civil law, but which appears to afford no practically useful distinction in the English law, is into urban and rustic servitudes—the former including all servitudes relating to buildings wherever situated; the latter, all those relating to land uncovered by buildings, whether situated in town or country.

The rustic servitudes comprised rights of way and watercourses and rights to drive cattle to water (*o*); the urban servitudes comprehended all those which belonged to a building, as caves-droppings, support of beams, rights to light (*p*).

(*n*) Répertoire de Jurisprudence, tit. Servitude, p. 50. The case above suggested by Merliu is precisely that of *Pheysey v. Vicary*, 16 M. & W. 481, substituting for a "door" a visible hard carriage drive.

(*o*) Porro autem ut prædia vel rustica sunt vel urbana, ita quoque et servitutes quæ iis inhærent, vel rusticæ sunt, vel urbanæ. Prædia rustica sunt, loca ædificiis vacua, in urbe arca, ruri ager; non enim loco, sed materie et genere, distinguuntur.—Vinnius, ad Inst. lib. 2, tit. 3.

Rusticorum prædiorum jura sunt hæc; iter, actus, via, aquæ ductus.—I. ff. de serv. præd.

Inter rusticorum prædiorum servitutes quidam computari rectè putant, aquæ hansturn, pecoris ad aquam adpulsum, jus pascendi, calcis coquendæ, arenæ fodiendæ.—Ibid. § 2.

(*p*) Prædiorum urbanorum servitutes sunt hæc, quæ ædificiis inhærent; ideo urbanorum prædiorum dictæ quoniam ædificia omnia urbana prædia appellamus, etsi in villâ (in the country, L. 211, ff. de v. s.) ædificata sint. Item urbanorum prædiorum servitutes sunt, ut vicinus onera vicini sustineat, ut in parietem ejus liceat vicino tigrum immittere, ut stillicidium vel flumen recipiat quis in ædes suas, vel in aream, vel in cloacam, ne altius quis tollat ædes suas, ne luminibus vicini officiat.—Ibid. § 1.

Et denique projiciendi, protegendi.—L. 2, ff. de serv. præd. urb.

Jus cloacæ mittendæ servitus est.—L. 7, ff. de serv.

Est et hæc servitus ne prospectui officiat.—L. 3, ff. de serv. præd. urb.

CHAPTER III.

OF THE ACQUISITION OF EASEMENTS BY EXPRESS
AGREEMENT.

THE origin of every easement may be referred to an [18]
agreement, either express or implied, of an owner of the
property to be subjected to it (a). The cases of express
agreement are of comparatively rare occurrence, and
present, for the most part, but little difficulty, as far, at
least, as concerns the mere extent of the right so con-
ferred. By far the greater proportion of easements rest
on implied agreements, the terms and conditions of
which can be collected only from the actual amount
of enjoyment proved to have been had.

SECT. 1.—*Nature of the Agreement.*

Whatever doubts may formerly have existed as to the
creation of easements by express agreement, it seems
to be now fully settled that, like all other incorporeal
hereditaments, they can be created only by an instru-
ment under seal.

Express con-
cession of
easement can
be by deed
only.

[(a) See the judgment of Littledale, J., in *Moore v. Ranson*, 3
B. & C. 339.]

19] “And here,” says Lord Coke (*b*), “is implied a division of fee or inheritance; viz. into corporeal, as lands and tenements, which lie in livery (*c*), comprehended in this word feoffment, and will pass by livery, by deed, or without deed; and incorporeal, which lie in grant, which cannot pass by livery, but by deed, as advowsons, commons, &c.; and the deed of incorporeate inheritances doth equal the livery of corporeate. Grant, *concessio*, is properly of things incorporeate, which, as hath been said, cannot pass without deed.”

“A license is not a grant, but may be recalled immediately, and so might this license the day after it was granted,” said Lord Ellenborough in *The King v. The Inhabitants of Horndon-on-the-Hill* (*d*). The license in this case was from the lord of the manor to build a cottage on the waste: the license had been executed, and the cottage inhabited by the licensee.

In *Hewlins v. Shippam* (*e*), where the question was whether a right to a drain running through the adjoining land could be conferred by parol license, this point was very fully considered; and in the elaborate judgment delivered by the court, it was decided, that such an interest can only be created by deed.

In *Cocker v. Cowper* (*f*), the plaintiff sued for the obstruction of a certain drain which had been originally constructed *at the plaintiff's expense*, on the defendant's land, *by his consent verbally given*. After it had been so enjoyed for some time, the defendant obstructed the channel, so that the water was prevented running as

(*b*) Co. Litt. 9 a.

[(*c*) Corporeal hereditaments now lie in grant also; 8 & 9 Vict. c. 106.]

(*d*) 4 M. & S. 565.

(*e*) 5 B. & C. 221; S. C. 7 D. & R. 783.

(*f*) 1 C. M. & R. 418.

before; and it was contended, on the part of the plaintiff, that the license so given having been acted upon could not be revoked by the defendant; but the court, without hearing the counsel for the defendant, held that [20] the plaintiff was clearly not entitled to recover:—"with regard to the question of license," the court said, "the case of *Hewlins v. Shippam* is decisive to show that an easement like this cannot be conferred except by deed, nor has the plaintiff acquired any other title to the water." "The mere entry into the close of another, and cutting a drain there, cannot confer a title."

Notwithstanding these positive authorities, questions of considerable difficulty and nicety have been raised as to the effect of a license; and it has been contended, "that a beneficial privilege in land may be granted without deed, and, notwithstanding the Statute of Frauds, without writing" (g). Effect of a license.

Upon a review of the authorities, however, it would appear that this position cannot be considered as law; and that the utmost effect of a license is—that it may work the extinguishment of an existing easement—as where permission is given to a man to erect something on his own land which is incompatible with the continuance of some easement over it, to which the licensor was entitled; [and this not merely on the ground that a license so acted on is irrevocable, but also because the license, coupled with the absence of interference by the licensor with execution of the works licensed, proves an intention on the part of the licensor permanently to abandon the right, and this, as will be seen from the cases subsequently cited, if communicated to and acted upon by the servient owner, is of itself sufficient in License may work the extinction of an easement.

some cases to extinguish the right. See the cases cited post, Part III. Chap. II. Sects. 2, 3. From which it will be collected that the question whether the intention permanently to abandon an easement being communicated to the owner of the servient tenement, but not acted upon by him, is sufficient to extinguish the right, still remains in doubt, according to some authorities (see the conflicting dicta of Erle, J., and Lord Campbell on this point in *Stokoe v. Singers* (*h*). Distinctions have been taken upon these questions of extinguishment and abandonment between rights created by deed and those claimed by prescription, also between such negative rights as the right of light, prohibiting a neighbour from using his own soil in some particular way, and those of a positive kind, which give the right to go on the neighbour's soil. These distinctions will be found discussed in the part of the work already referred to.]

"There is nothing unreasonable," says Tindal, C. J., in *Liggins v. Inge* (*i*), "in holding that a right which is gained by occupancy may be lost by abandonment."

Coparceners.

The only exception to this general rule appears to be in the case of coparceners; for, as "land, or other things, that lie in livery, may pass between them without deed, so also may incorporeal hereditaments which lie in grant" (*h*).

Winter v. Brockwell.
[21]

In *Winter v. Brockwell* (*l*), the declaration stated, that the plaintiff was entitled to an easement of a passage for light and air to his dwelling-house, through an ancient window, over an open space of land of the defendant,

(*h*) 8 E. & B. 37.

(*i*) 7 Bing. 693.

(*h*) *Johnson v. Wilson*, Willes, 253; Co. Litt. 169; 21 Edw. 3, 2.

(*l*) 8 East, 308.

and that, by means of such open space, noisome smells from the defendant's house evaporated, without occasioning any nuisance to the occupier of the plaintiff's house, and that the defendant wrongfully erected a skylight above the plaintiff's ancient window, and covering the open space above mentioned, by means of which "the light and air were prevented entering the plaintiff's window and into his house, and noisome smells, arising from the adjoining house, were prevented from evaporating, and entered the plaintiff's dwelling-house." The defendant pleaded the general issue.

*Winter v.
Brookwell.*

It appeared in evidence that the open space "which belonged to the defendant's house had been inclosed and covered by a skylight in the manner stated, *with the express consent and approbation* of the plaintiff, obtained before the inclosure was made, who also gave leave to have part of the framework nailed against his wall; some time after it was finished, the plaintiff objected to it, and gave notice to have it removed; but Lord Ellenborough was of opinion, that the license given by the plaintiff to erect the skylight, having been acted upon by the defendant and the expense incurred, could not be recalled, and the defendant made a wrongdoer, at least not without putting him in the same situation as before, by offering to pay all the expenses which had been incurred in consequence of it. And, under this direction, the defendant obtained a verdict."

On a motion for a new trial, in support of which no argument appears to have been advanced, his Lordship said, "That the point was new to him when it occurred at the trial, but he then thought it very unreasonable, that, after a party had been led to incur expense in consequence of having a license from another to do an act,

*Winter v.
Brookwell.*

and the license had been acted upon; that the other should be permitted to recall his license, and treat the first as a trespasser for having done that very act. That he had afterwards looked into the books upon this point, and found himself justified by the case of *Webb v. Paternoster* (*m*), where Haughton, J., lays down this rule, that a license executed is not countermandable, but only where it is executory. And here the license was executed."

It is to be observed, in this case, that the action was brought for the consequential injury only, and not for the trespass committed on the plaintiff's land by affixing the iron work to his wall, as to which no point appears to have been made. The question arising on the Statute of Frauds, as to this being an interest in land, was, we are told in a note, "stated and overruled." The most important observation which suggests itself is on the statement of the injury in the declaration. The complaint appears to have been twofold: that is to say, the plaintiff complained that his easement—his passage of light and air to his ancient window—was obstructed, and also that he had been deprived of a distinct right, which every owner of property possesses without any prescription, and which can only be infringed upon by the acquisition of an easement on the part of his neighbour; viz. a right to enjoy his property without being subject to any private nuisances, such as the noisome smells mentioned in this case. From the loose manner in which the case is reported, it is not easy to say whether the smells proceeded from the defendant's house, or from the house of a third party; in *Hewlins v. Shippam*, the latter was considered to have been the

[23]

(*m*) Palmer, 71; 2 Roll. Rep. 152; Poph. 151.

case. Nor does it appear from the statement of facts in the report, whether any such smells had actually been caused by the defendant, or whether, supposing any such smells to have been produced, evidence of a prescriptive right to make such a nuisance was adduced on the part of the defendant, the only injury alluded to in the judgment being the obstruction to the light and air. This case appears to have undergone very little consideration (n).

*Winter v.
Brockwell.*

Fentiman v. Smith (o) was an action brought for diverting a water-course from the plaintiff's mill. The declaration stated the plaintiff's possession of a mill, and that by reason thereof he was entitled to the use and benefit of the water of a rivulet, which, until the interruption complained of, flowed through a tunnel into another stream, whereon the plaintiff's mill was built; but that defendant cut a channel, and thereby diverted the water from running into the said tunnel, and so to the mill.

*Fentiman v.
Smith.*

At the trial, it appeared that the tunnel was made in the defendant's land, and fixed into the ground with stone-work; that the defendant agreed for a guinea to let the plaintiff lay the tunnel, for the purpose of conveying the water to the mill; that defendant even assisted at the making of the tunnel, under the plaintiff's directions; but no conveyance was made of the land to

[24]

[(n) It is, however, recognized as law by *Tindal*, C. J., in *Liggins v. Inge*, cited post, in this chapter; and (as was pointed out by *Alderson*, B., in *Wood v. Lead-bitter*) was decided on grounds inapplicable to cases as to the mode of creating an easement;

and in *Davies v. Marshall*, 10 C. B., N. S. 711, *Williams*, J., said that *Winter v. Brockwell* and *Liggins v. Inge* have not been in the least shaken by subsequent cases.]

(o) 4 East, 107.

*Pentiman v.
Smith.*

the plaintiff; the guinea was afterwards tendered to the defendant, but he refused to receive it, or to give his assent to the continuance of the tunnel, and made the obstruction complained of. A verdict having passed for the plaintiff, with leave to move to enter a nonsuit, in opposition to a rule obtained for this purpose, it was contended, "that it was sufficient for the plaintiff, against a wrongdoer, to declare upon his possession of the mill with the appurtenants;" but Lord *Ellenborough* said, "Such an allegation could not be sustained without showing that the *appurtenants* were *legally* such. Now here *the title to have the water flowing in the tunnel over the defendant's land could not pass, by parol license without deed*, and the plaintiff could not be entitled to it, as stated in the declaration, by reason of his possession of the mill; but he had it by the license of the defendant, or by contract with him: and if by license, it was revocable at any time. The enjoyment, with the defendant's assent, was not left as evidence to the jury to presume a grant, *but it was supposed that it gave a title in point of law, which it clearly did not.*"

This case is not only clear and positive in its language, but it derives additional importance as showing the construction that ought to be put upon any ambiguity of language occurring in a subsequent decision of the same learned judge in *Winter v. Brockwell*; as it can hardly be supposed, that if he had changed his opinion, and adopted a view quite contrary to that previously expressed by him, he would not have made some allusion to the case in which he had before given such a decided opinion.

*Taylor v.
Waters.*

The principal authority in support of the position—that a parol license, when executed, can pass an incor-

poreal hereditament—is the case of *Tayler v. Waters* (p). *Gibbs*, C. J., in delivering the judgment of the court in that case, said, “This was an action against the door-keeper of the Opera House, for denying admission to the plaintiff, who was the holder of a silver ticket, purporting to give him an entrance into that theatre for twenty-one years. It was objected, that the right claimed was an interest in land, and, being for more than three years, could not pass without a writing, signed by the party, or his agent authorized in writing, and that W. Tayler was not so authorized by the trustees. And it was further insisted by the defendant, that such an interest could only pass by deed.” The answer given to these objections was, that this was not an interest in land, but a license irrevocable to permit the plaintiff to enjoy certain privileges thereon, and was not required to be in writing by the Statute of Frauds, though it extended beyond the term of three years, and, consequently, might be granted without a deed; and though W. Tayler had affected to grant this by deed, it may bind the trustees not as their deed, but as a license authorized by them. In support of this doctrine, the following cases are found:—*Webb v. Paternoster* (q), license to the plaintiff from Sir W. Plummer to lay a stack of hay on his land for a reasonable time; afterwards Sir W. Plummer leased the land, and the lessee turned in his cattle and ate the hay, for which this action was brought. The court held that such license was good, and could not be countermanded within a reasonable time; but that more than a reasonable time had

Tayler v.
Waters.

[25]

[26]

(p) 7 Taunt. 382.

(q) Palm. 71; S. C. 2 Ro. Rep. 152; Poph. 151.

*Taylor v.
Waters.*

“ elapsed, half-a-year, and therefore the license was at
 “ end. This case was recognized and acted upon by
 “ Lord *Ellenborough* and the Court of King’s Bench in
 “ *Winter v. Brockwell* (r). This shows that a beneficial
 “ license, to be exercised upon land, may be granted
 “ without deed, and cannot be countermanded, at least
 “ after it has been acted upon; and this would, also,
 “ be sufficient to show that this is not such an interest
 “ in land as, by the Statute of Frauds, can only pass by
 “ writing; but if any doubt remained upon the latter
 “ point, it has been long ago expressly decided by the
 “ Court of King’s Bench in the case of *Wood v. Lake* (s),
 “ better reported in a MS. book of Mr. Justice
 “ Burrough, p. 36.—‘ License to stack coals on the
 “ ‘ defendant’s close for seven years cannot be revoked
 “ ‘ at the end of three.’ These cases abundantly prove
 “ that a license to enjoy a beneficial privilege on land
 “ may be granted without deed, and, notwithstanding
 “ the Statute of Frauds, without writing. What the
 “ plaintiff claims is a license of this description, and
 “ not an interest in the land. That it was in the or-
 “ dinary course of management to make such grants
 “ appears from the plaintiff not having been disturbed
 “ by the trustees while they had possession for some
 “ years, at least in and after 1800. He is, therefore,
 “ entitled to exercise the license granted to him, and
 “ may maintain the present action against the defendant,
 “ who has disturbed him in it.”

Assuming the right here claimed by the plaintiff to
 be an easement, it must be conceded that this case
 [27] would be a direct authority for the position that an
 easement may be created by parol; it does not, how-

(r) 8 East, 308.

(s) Sayer, 3.

ever, rest on the foundation of any previous decision, except that in *Sayer*; the case of *Webb v. Paternoster* is in reality a mere dictum, as the court was not called upon to decide the question as to the validity of the license; and the case of *Winter v. Brockwell*, on which the Chief Justice seems principally to rely, is clearly no authority for the position it is here cited to support, as is shown by several subsequent cases, in which the judgment of Lord *Ellenborough* has been fully considered (*t*).

*Taylor v.
Waters.*

Thus, comparatively unsupported by any earlier authority, it is directly at variance with numerous recent decisions, in two of which the question has been most elaborately discussed. •

In the case of *Hewlins v. Shippam* (*u*), for a valuable consideration given by the plaintiff to the defendant, he assented to the plaintiff's making a drain at his own expense in his (the defendant's) land. The plaintiff made his drain at a considerable expense. In an action brought against the defendant for afterwards stopping up the drain, *Graham, B.*, was of opinion that the right claimed under the license granted by the defendant to have the drain in the soil of another, was an uncertain interest in the land, within the first section of the Statute of Frauds: and not being granted by any instrument in writing, the plaintiff acquired under it a right at will only, which was determined by the defendant's stopping up the drain. He therefore directed a nonsuit, with leave to the plaintiff to move to enter a verdict.

*Hewlins v.
Shippam.*

(*t*) *Hewlins v. Shippam, Lig-
gins v. Inge, Cocker v. Conifer.*

(*u*) 5 B. & Cr. 221; S. C. 1 D.
& R. 783.

*Hewlins v.
Shippam.*

[28]

A rule having been obtained to set aside the nonsuit, the court upon argument discharged it. The elaborate judgment of the court, in which all the authorities are reviewed, was delivered by *Bayley, J.* “A right of way or a right of passage for water,” said the learned Judge, “(where it does not create an interest in the land,) is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery but in grant, and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot), otherwise than by deed. *Termes de la Ley*, a book of great antiquity and accuracy, defines an easement to be a privilege that one neighbour hath of another by charter or prescription, without profit; and it instances, ‘as a way or sink through his land, or such like.’ In *Co. Litt.* 9a, Lord Coke distinguishes between corporeal things which lie in livery, and incorporeal which lie in grant, and cannot pass but by deed, as advowsons, commons, &c.; and it seems to be his opinion, that (except in certain specified cases), where livery is necessary as to the one, a deed is necessary as to the other. The same may be collected from the passage already cited from *Co. Litt.* 42a. In *Co. Litt.* 169, the excepted case of parceners is mentioned: and there it is said, that though common of estovers or pasture, or a corody, or a way, lie in grant, they may, upon partition between the parceners, be granted without deed. So both *Littleton* and Lord Coke state, in the same part, that a rent may be granted in the case of parceners for owelty of partition without deed; and Lord Coke notices that rents, commons, advow-

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*Hewlins v.
Shippam.*

“ sons, and the like, that lie in grant, though they
 “ cannot pass without deed, may be divided between
 “ parceners by parol without deed. Chattels, whether
 “ real or personal, may in general be granted without
 “ deed; *Sheppard's Touchstone*, 232; and in the case of
 “ things lying in livery, a demise thereof may be made
 “ for any number of years at common law without
 “ deed; but Lord *Coke*, in *Co. Litt.* 85*a*, makes a dis-
 “ tinction between original chattels and chattels created
 “ out of a freehold lying in grant, that the former may
 “ pass without deed, the latter cannot be created or
 “ pass without it; and whether there is a distinction in
 “ this respect between chattel interests created out of
 “ freeholds lying in livery and freeholds lying in grant
 “ (which I think there is not), it is not necessary to
 “ decide, because this is the case of a freehold, not of a
 “ chattel interest. *Sheppard*, in his *Touchst.* 231, lays
 “ it down, that a license or liberty (amongst other
 “ things) cannot be created or annexed to an estate of
 “ inheritance or freehold without deed. In 2 *Rolle's*
 “ *Abr.* 62, it is laid down that a thing lying merely
 “ in grant cannot pass without deed. In 9 *Co.* 9, it is
 “ said, arguendo, that tenant for life cannot *by word*
 “ *without deed* have the privilege of being dispu-
 “ able for waste; and that position is adopted in
 “ *Sheppard's Touchst.* p. 231. In *Gilbert's Law of*
 “ *Evidence*, p. 96, 6th edition, this is laid down: ‘ If a
 “ ‘ man shows title to a thing lying in grant, *he fails if*
 “ ‘ *the seal be torn off from his deed*; for a man cannot
 “ ‘ show a title to a thing lying in solemn agreement,
 “ ‘ but by solemn agreement; and there can be no
 “ ‘ solemn agreement without a seal, so that possession
 “ ‘ alone is not sufficient, since the thing itself does not

*Herlins v.
Shippam.*

“ ‘ lie in possession but in agreement ; therefore a man
 “ ‘ cannot claim a title to a watercourse *but by deed, and*
 “ ‘ *under seal.*’ *Bolton v. The Bishop of Carlisle* (x)
 “ is at variance with the position laid down by Lord
 “ Chief Baron *Gilbert*, that the party fails *if the seal*
 “ *be torn off the deed*. It was decided in that case,
 “ that, if the deed be destroyed, other evidence may be
 “ given to show that the thing was once granted.
 “ The general position, however, that a man cannot
 “ claim title to a thing lying in grant, but by deed, was
 “ not questioned in that case. In *Monk v. Butler* (y),
 “ where the plaintiff in replevin answered an avowry
 “ for damage feasant by a plea of license from a com-
 “ moner who had right for twenty beasts, it was
 “ objected, that, if the commoner could license, he
 “ could not do so without deed ; and of that opinion
 “ was the whole court. In *Runsey v. Rawson* (z) the
 “ objection to such a license on the account of its not
 “ being stated to be by deed, after verdict for the
 “ plaintiff on a collateral issue, was overruled, because
 “ the license was only to take the profit *unicâ vice*, and
 “ because no estate passed by it. Yet in a subsequent
 “ case of *Hoskins v. Robins* (a) a similar objection was
 “ overruled, not on the ground that a parol license
 “ would be sufficient, but on the ground that the
 “ objection to the mode of pleading the license was
 “ waived by an issue on a collateral point, and that
 “ after verdict on such issue it must be taken that the
 “ license was by deed ; but, according to the report in
 [31] “ *Saunders, Hale, C. J.*, and the court, seemed to be

(x) 2 H. Bl. 259.

(y) Cro. Jac. 574.

(z) 1 Vent. 18—25.

(a) 1 Vent. 123—163; 2 Saund.
327.

“ of opinion, that the license could not be granted
 “ without deed. In *Harrison v. Parker* (b), where
 “ liberty and license, power and authority, were granted
 “ to the plaintiff and his heirs to build a bridge across
 “ a river, from plaintiff’s close to a close of Sir *George*
 “ *Warren*, and liberty and license to plaintiff to lay the
 “ foundations of one end on Sir *G.*’s close, the grant
 “ was by deed. And in *Fentiman v. Smith* (c), where
 “ the plaintiff claimed to have passage for water by a
 “ tunnel over defendant’s land, Lord *Ellenborough* lays
 “ it down distinctly: ‘ The title to have the water flow-
 “ ‘ ing in the tunnel over defendant’s land could not
 “ ‘ pass by parol license without deed.’ Upon these
 “ authorities we are of opinion, that, although a parol
 “ license might be an excuse for a trespass till such
 “ license were countermanded, that a *right and title* to
 “ have passage for the water, for a freehold interest,
 “ required a deed to create it; and that, as there has
 “ been no deed in this case, the present action, which
 “ is founded on a right and title, cannot be supported.
 “ The case of *Winter v. Brockwell* (d), which was
 “ relied upon on the part of the plaintiff, appears
 “ clearly distinguishable from the present. All that
 “ the defendant there did, he did *upon his own land*.
 “ He claimed no right or easement upon the plaintiff’s.
 “ The plaintiff claimed a right and easement against
 “ him, viz., the privilege of light and air through a
 “ parlour window, and a free passage for the smells of
 “ an adjoining house through defendant’s area; and the
 “ only point decided there was, that, as the plaintiff

Hemlin v.
Shippam.

(b) 6 East, 154.

(d) 8 East, 309.

(c) 4 East, 107.

*Hentins v.
Shippam.*

[32]

“ had consented to the obstruction of such his easement,
 “ and had allowed the defendant to incur expense in
 “ making such obstruction, he could not retract that
 “ consent without re-imbursing the defendant that ex-
 “ pense. But that was not the case of the grant of an
 “ easement to be exercised upon the grantor’s land, but
 “ a permission to the grantee to use his own land in a
 “ way in which, but for an easement of the plaintiff’s,
 “ such grantee would have had a clear right to use it.
 “ *Webb v. Paternoster* (e), *Wood v. Lake* (f), and
 “ *Taylor v. Waters* (g), were not cases of freehold
 “ interest, and in none of them was the objection taken
 “ that the right lay in grant, and therefore could not
 “ pass without deed. These, therefore, cannot be con-
 “ sidered as authorities upon the point: and on these
 “ grounds, therefore—that the right claimed by the de-
 “ clarator is a freehold right; and that, if the thing
 “ claimed is to be considered as an easement, not an
 “ interest in the land, such a right cannot be created
 “ without deed—we are of opinion that the nonsuit
 “ was right, and that the rule ought to be dis-
 “ charged.”

*Bryan v.
Whistler.*

In *Bryan v. Whistler* (h) the right to be buried in a particular vault was held to be an easement capable of being created by deed only; and therefore a parol agreement not under seal was held to confer no right, though the plaintiff had paid a valuable consideration on the faith of its validity.

In an old case, which does not appear to have been

(e) Palm. 71; S. C. 2 Roll. Rep.
 152; Poph. 151.
 (f) Sayer, 3.

(g) 7 Tannt. 374.
 (h) 8 B. & C. 288; S. C. 2 Man.
 & Ry. 318.

adverted to in more recent decisions, it was held that a parol license could not confer an easement to carry on a noisy trade. *Bryan v. Whistler.*

In *Bradley v. Gill* (i), the plaintiff brought an action [33] on the case for a nuisance occasioned by the recent erection of a smith's forge and shop, so near to the plaintiff's house, that the plaintiff and his family were disturbed by the noise of the defendant's business. *Bradley v. Gill.*

The defendant pleaded that he had carried on the trade of a blacksmith for twenty years, and that the plaintiff advised him to come and live in the said house and carry on his trade there, by reason whereof he came to the said house and built there a convenient room to erect a smith's forge, traversing the erection of any other smith's shop.

The opinion of the court was, that the action lay, and that the plea was no answer to the declaration, and that the traverse was idle; but the defendant, by consent, had liberty to amend his plea.

In *Brown v. Windsor* (k) the action was brought for withdrawing support from the plaintiff's house; the evidence of right to the support claimed consisted in proof of a parol permission on the part of the then owner of the defendant's property to the plaintiff, to rest his building on a pine-end wall standing thereon; under this permission the support had been enjoyed for twenty-six years. The plaintiff recovered; and it was afterwards objected that there could not be, by law, such an easement as the right to support for a house *in alieno solo*; but supposing that such an easement could be acquired, no objection whatever was made to the mode of its acquisition: nor was any question raised as to whether an

(i) 1 Lutw. 69.

(k) 1 Cr. & J. 20.

*Brown v.
Windsor.*

[34]

enjoyment, commencing under a license, would confer an easement. The decision of the court cannot, therefore, be considered as an authority upon this subject: nor does it appear to have ever been treated as such in the later decisions of the courts upon this point.

*Liggins v.
Inge.*

In *Liggins v. Inge* (1) it appeared that the predecessor of the plaintiff, who was entitled to a flow of water to his mill, over the defendants' land, by a parol license authorized the defendants to cut down and lower a bank, and to erect a weir upon their own land, the effect of which was to divert into another channel the water which was requisite for the working of the plaintiff's mill; subsequently the plaintiff complained to the defendants of the injurious effects of the weir, and called upon them to restore the bank to its ancient height, and to remove the weir; and, upon a refusal on the part of the defendants to do this, an action was brought. *Tindal*, C. J., in his judgment, enters fully into the question of the validity of parol licenses:—

“It will be unnecessary, on the present occasion, to consider more than one of the questions which have been argued at the bar, *viz.* whether the present action, upon the facts stated in the award of the arbitrator, is maintainable against the defendants.

“The action is, in point of form, an action of tort, and charges the defendants with wrongfully continuing a certain weir or fletcher, which the defendants had before erected upon one of the banks of the river, and by that means wrongfully continuing the diversion of the water, and preventing it from flowing to the plaintiff's mill in the manner it had been formerly accustomed to do. It appeared in evidence before the arbitrator, that

(1) 7 Bing. 682; S. C. 5 M. & P. 712.

the bank of the river which had been cut down was the soil of the defendants, and that the same had been cut down and lowered, and the weir erected, and the water thereby diverted by them, the defendants, and at their expense, in the year 1822, under a parol license to them given for that purpose by the plaintiff's father, the then owner of the mill; and that, in the year 1827, the plaintiff's father represented to the defendants, that the lowering and cutting down the bank were injurious to him in the enjoyment of his mill, and had called upon them to restore the bank to its former state and condition, with which requisition the defendants had refused to comply.

*Liggins v.
Inge.*

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“ The question, therefore, is, whether such non-compliance, and the keeping the weir in the same state after, and notwithstanding the countermand of the license, is such a wrong done on the part of the defendants as to make them liable to this action.

“ The argument on the part of the plaintiff has been, that such parol license is, in its nature, countermandable at any time, at the pleasure of the party who gave it; that, to hold otherwise, would be to allow to a parol license the effect of passing to the defendants a permanent interest in part of the water which before ran to the plaintiff's mill, which interest, at common law, could only pass by grant under seal, being an incorporeal hereditament, and which, at all events, would be determinable at the will of the grantor, since the Statute of Frauds, as being ‘ an interest in, to, or out of lands, tenements and hereditaments.’

“ If it were necessary to hold, that a right or interest in any part of the water, which before flowed to the plaintiff's mill, must be shown to have passed from the

*Liggins v.
Inge.*

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plaintiff's father to the defendants under the license, in order to justify the continuance of the weir in its original state, the difficulty above suggested would undoubtedly follow; for it cannot be denied, that the right to the flow of the water, formerly belonging to the owner of the plaintiff's mill, could only pass by grant, as an incorporeal hereditament, and not by a parol license. But we think the operation and effect of the license, after it has been completely executed by the defendants, is sufficient, without holding it to convey any interest in the water, to relieve them from the burthen of restoring to its former state what has been done under the license, although such license is countermanded: and, consequently, that they are not liable to an action as wrongdoers, for persisting in such refusal.

“ The parol license, as it is stated in the award of the arbitrator, was a license to cut down and lower the bank, and to erect the weir. Strictly speaking, if the license was to be confined to those terms, it was at once unnecessary and inoperative; for the soil being the property of the defendants, they would have the right to do both those acts without the consent of the owner of the lower mill. But as the diversion of part of the water which before flowed to that mill would be the necessary consequence of such acts, it must be taken that the object and effect of such license was to give consent, on the part of the plaintiff's father, to the diverting of the water by means of those alterations. We do not, however, consider the object, and still less the effect, of the parol license, to be the transferring from the plaintiff's father to the defendants any right or interest whatever in the water which was before accustomed to flow to the lower mill, but simply to be an

acknowledgment on the part of the plaintiff's father, that he wanted such water no longer for the purposes of his mill; and that he gave back again and yielded up, so far as he was concerned, that quantity of water which found its way over the weir or fletcher, which he then consented should be erected by the defendants. And we think, after he has once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it is too late then to retract such consent, or to throw on those other persons the burthen of restoring matters to their former state and condition.

*Liggins v.
Inge.*

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“Water flowing in a stream, it is well settled, by the law of *England*, is *publici juris*. By the *Roman* law, running water, light, and air, were considered as some of those things which had the name of *res communes*, and which were defined, ‘things, the property of which belong to no person, but the use to all.’ And, by the law of *England*, the person who first appropriates any part of the water flowing through his land to his own use, has the right to the use of so much as he thus appropriates, against any other. *Bealey v. Shaw (m)*. And it seems consistent with the same principle, that the water, after it has been so made subservient to private uses by appropriation, should again become *publici juris* by the mere act of relinquishment. There is nothing unreasonable in holding that a right which is gained by occupancy should be lost by abandonment. Suppose a person who formerly had a mill upon a stream, should pull it down, and remove the works, with the intention

(m) 6 East, 208.

*Liggins v.
Inge.*

[38]

never to return; could it be held that the owner of other land adjoining the stream might not erect a mill and employ the water so relinquished; or that he could be compellable to pull down his mill, if the former mill owner should afterwards change his determination, and wish to rebuild his own? In such a case it would undoubtedly be a subject of inquiry by a jury, whether he had completely abandoned the use of the stream, or had left it for a temporary purpose only; but, that question being once determined, there seems no ground to contend that an action would be maintainable against the person who erected the new mill, for not pulling it down again after notice. And if, instead of his intention remaining uncertain upon the acts which he had done, the former proprietor had openly and expressly declared his intention to abandon the stream, that is, if he had licensed the other party to erect a mill, the same inference must follow with greater certainty. Or, suppose *A.* authorizes *B.*, by express license, to build a house on *B.*'s own land, close adjoining to some of the windows of *A.*'s house, so as to intercept part of the light; could he afterwards compel *B.* to pull the house down again, simply by giving notice that he countermanded the license? Still further, this is not a license to do acts which consist in repetition, as, to walk in a park, to use a carriage-way, to fish in the waters of another, or the like; which license, if countermanded, the party is but in the same situation as he was before it was granted; but this is a license to construct a work, which is attended with expense to the party using the license; so that, after the same is countermanded, the party to whom it was granted may sustain a heavy loss. It is a license to do something, that in its own nature seems

intended to be permanent and continuing; and it was the fault of the party himself, if he meant to reserve the power of revoking such license, after it was carried into effect, that he did not expressly reserve that right when he granted the license, or limit it as to duration. Indeed, the person who authorizes the weir to be erected becomes, in some sense, a party to the actual erection of it; and cannot afterwards complain of the result of an act which he himself contributed to effect.

*Liggins v.
Inga.*

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“ Upon principle, therefore, we think the license, in the present case, after it was executed, was not counter-mandable by the person who gave it; and, consequently, that the present action cannot be maintained. And, upon authority, this case appears to be already decided by that of *Winter v. Brockwell* (*n*), which rests on the judgment in *Webb v. Paternoster* (*o*). We see no reason to doubt the authority of that case, confirmed as it has since been by the case of *Taylor v. Waters* (*p*) in this court, and recognized as law in the judgment of Mr. Justice Bayley, in the case of *Hewlins v. Shippam*, in the Court of King’s Bench.”

In *Cocker v. Cowper* the doctrine laid down in *Hewlins v. Shippam* was fully recognized (*q*). In that case an action was brought for stopping up a water-course. It appeared from the award of the arbitrator, that the channel in question consisted of a drain and tunnel, which had been constructed in the defendant’s land by the plaintiff, in the year 1815, with the verbal consent

*Cocker v.
Cowper.*

(*n*) 8 East, 308.

(*o*) Palmer, 71; S. C. 2 Rol. Rep. 152; Poph. 151.

(*p*) 7 Taunt. 383; S. C. 2 Marsh. 560. See a corrected report of

this case from the MS. of Burrough, J., in note, *Wood v. Lead-bitter*, post, p. 65.

(*q*) 1 C. M. & R. 418.

*Cocker v.
Cooper.*

[40]

of the then tenant and of the defendant, and that the water had flowed through it up to the year 1833, when, upon the plaintiff's refusal to pay for the use of the water, the defendant diverted the channel. The Court of Exchequer were clearly of opinion that the plaintiff was not entitled to recover. "With regard to the question of license," said the court, "the case of *Hewlins v. Shippam* is decisive to show that an easement, like this, cannot be conferred unless by deed" (r).

*Bridges v.
Blanchard.*

In *Bridges v. Blanchard* (s) this point was raised in argument, but not decided by the court, as it appeared that no license had, in fact, been given.

*Wallis v.
Harrison.*

In the recent case of *Wallis v. Harrison and others* (t) an action was brought by the reversioner, for digging up the soil and making embankments and a railway over land in the occupation of his tenant. The defendant, among other pleas, pleaded, "that before the close, in which, &c., became the plaintiff's property, the Dean and Chapter of Durham, being seised in fee of the said close, agreed with the defendants that they should have license, liberty, power and authority to enter upon the said close, and to form, make and maintain certain roads, &c.: and that the said Dean and Chapter should ratify and confirm the same to the defendants; and that before the plaintiff had any interest in the said close, the said Dean and Chapter gave and delivered to the defendants at their request possession of the said way-leave, &c. over which the said roads now are, and at the same time when &c. had been constructed, with leave, license, authority and power to the defendants to enter and set out the same; whereupon, before, &c., they

(r) See also *Bryan v. Whistler*,
8 B. & C. 288.

(s) 1 A. & E. 536.

(t) 4 M. & W. 538.

entered and set out the same:" the plea then alleged an indenture by which the Dean and Chapter "granted and demised, and granted, ratified and confirmed, unto the defendants such full liberty, &c.; and averred that the defendants, by virtue of such leave, &c., and such indenture, had made the road, and unavoidably committed the said trespasses. To this plea the plaintiff demurred on the ground "that the right of making the road was a matter which lay in grant, and could only be conferred by deed and not by parol, and the deed mentioned in the plea, as it appeared on oyer, did not amount to a confirmation of any prior license by deed. The court held the plea to be bad, as such a license might be countermanded at any time by the owner of the land who granted it, and at all events could not be binding on his transferee.

*Wallis v.
Harrison.*

[41]

Lord *Abinger*, C. B., said, in delivering judgment, "Then, treating it as a plea of license, I think it is bad on general demurrer, because a mere parol license to enjoy an easement on the land of another does not bind the grantor, after he has transferred his interest and possession in the land to a third person. I never heard it supposed, that if a man out of kindness to a neighbour allows him to pass over his land, the transferee of that land is bound to do so likewise. But it is said that the defendant should have had notice of the transfer. This is new law to me. A person is bound to know who is the owner of the land upon which he does that which, *primâ facie*, is a trespass. Even if this were not so, I think the defendants ought, in excuse of their trespass, to have pleaded the fact that they had no notice of the transfer. It is true it would be the assertion of a negative. But I think this would be one of

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those cases where, to make a title or excuse good, a negative should be shown on the pleadings, even if the proof of the affirmative might be on the opposite party.

[42] As to the case of *Webb v. Paternoster*, the grant of the licence to put the haystack on the premises was in fact a grant of the occupation by the haystack, and the party might be considered in possession of that part of the land which the haystack occupied, and that might be granted by parol." And *Parke*, Baron, added, "Then with regard to the license, the plea is bad in substance. We are not called upon in this case to consider, whether a license to create or make a railroad, granted by a former owner of the soil, is countermandable after expense has been incurred by the licensee, which was the question in *Winter v. Brockwell*; for it is not alleged that there has been any expense incurred in consequence of the license, and therefore it remains executory; and I take it to be clear, that a parol executory license is countermandable at any time; and if the owner of land grants to another a license to go over or do any act upon his close, and then conveys away that close, there is an end to the license; for it is an authority only with respect to the soil of the grantor; and if the close ceases to be his soil, the authority is instantly gone. *Webb v. Paternoster* is very distinguishable from this case, for there the license was executed, by putting the stack of hay on the land; the plaintiffs there had a sort of interest against the licensor and his assigns: but a license executory is a simple authority excusing trespasses on the close of the grantor, as long as it is his, and the license is uncountermanded, but ceases the moment the property passes to another"(u).

[(u) See *Hoffey v. Henderson*, 17 Q. B. 575, where the plaintiff claimed a right to enter a house in the possession of the defendant

The result of the decided cases appears to be this— that a man may, in some cases, by parol license, relinquish a right which he has acquired in addition to the ordinary rights of property, and thus restore his own and his neighbour's property, to their original and natural condition; but he cannot, by such means, impose any burthen upon land in derogation of such ordinary rights of property (*y*)—as, for instance, a parol license will be valid to build a wall in front of his ancient windows, while a similar permission to turn a spout on his land from a neighbouring house will be invalid and revocable; but it should seem, in order that a parol license should have this effect, the act licensed should be executed, and the necessary consequence of such execution should be, *per se*, the extinguishment of the right; for the cases do not appear to furnish any authority for saying, that where the extinguishment of an easement would depend upon a repetition of the licensed acts, a parol license would be sufficient to effect it; and, indeed, where the acts from their nature lie in repetition, such license could not be executed.

Result of
authorities (*x*).
[43]

This doctrine, that an easement may be extinguished by an executed authority to a man to do an act on his own land, the necessary consequence of which will be such extinguishment, coincides with the provision of the civil law:—"If I have the right of discharging my

Concordance of
the civil law.

for the purpose of removing fixtures, under a license given for that purpose by the lessor, who demised the house to the defendant subsequently to the giving of the license; and see *Coleman v. Foster*, 1 H. & N. 37, in which a license to enter a playhouse was set up against a subsequent lessee

of the playhouse: the attempts in both cases were unsuccessful.]

[(*x*) See post, Part III. Ch. II. Sects. 2, 3, on the extinguishment of easements.]

[(*y*) See the observations, post, as to the interference of the Court of Chancery in such cases.]

Result of
authorities.

eaves' dropping into your area, and I authorize you to build in this area, I lose my right of discharge; and so, if I have a right of way over your property, and I authorize you to do anything in the place over which my right of way exists, I lose my right of way"(z).

As to the case of *Tayler v. Waters*, not only are its general positions overruled by the more recent decisions of *Hewlins v. Shippam* and *Cocker v. Cowper*, but it is in itself open to the objection of depending upon the two cases already adverted to, and on a total misconception of the case of *Winter v. Brockwell*. *Gibbs, C.J.*, evidently overlooks the important distinction between a license to do a thing upon a man's own land and a license to do something on the land of the licensor; the latter was the case then before him; whereas *Winter v. Brockwell* was the former.

[44] " *Winter v. Brockwell*," said *Boyley, J.*, in delivering the judgment of the court in *Hewlins v. Shippam*, "was not the case of the grant of an easement to be exercised upon the grantor's land, but a permission to the grantee to use his own land in a way in which *but for an easement of the plaintiff's*, such grantee would have had a clear right to use it."

The whole current of decisions is in favour of the view here taken, with the exception of *Tayler v. Waters*, and the earlier cases of *Webb v. Paternoster* and *Wood v. Lake*, relied upon by the *C. J. Gibbs* in his judgment. In *Webb v. Paternoster* a parol license had been given to the plaintiff to lay a stack of hay on the land of the

(z) Si stillicidii immittendi jus habeam in aream tuam, et permiserero jus tibi in eâ arcâ ædificandi, stillicidii immittendi jus amitto; et similiter si per tuum fundum

via mihi debeatur, et permiserero tibi in eo loco per quem via mihi debetur, aliquid facere, amitto jus viæ.—L. 8, ff. Quem serv. amit.

Result of
authorities.

defendant's lessee for a reasonable time; the lessee turned his cattle upon the land, and for this the action was brought. The decision of the court in favour of the defendant went on the ground, that a reasonable time had expired; and the observations of the court were, consequently, altogether extrajudicial. In *Wood v. Lake* a parol license was given to stack coals on defendant's land for seven years, and the Court of King's Bench held that such license could not be revoked at the end of three years. It seems impossible to reconcile either the dictum in *Webb v. Paternoster*, or the decision of the court in *Wood v. Lake*, with the more recent decision of the Court of King's Bench in *The King v. Horndon-on-the-Hill (a)*, in which a settlement was claimed in respect of a cottage built on the waste of the manor by the parol license of the lord. It was there urged in argument, "that it was unreasonable, that, after a party has been led to incur expense in consequence of having obtained a license from another, that the other should be permitted to recall his license, and treat him as a trespasser; for which reason it was laid down, that a license executed is not countermandable, but only when it is executory." But Lord *Eltenborough* said, "A license is not a grant, but may be recalled immediately; and so might this license the day after it was granted."

[45]

But, indeed, authority is hardly necessary to counter-vail these two cases, as in neither, as was observed by the Court of King's Bench in *Hewlins v. Shippam*, does it appear that the objection was taken—that the right lay in grant, and therefore could not pass without deed; in addition to which it may be observed, that the case

Result of
authorities.

in *Sayer* is of doubtful authority (*b*). Mr. *Starkie* (*c*) observes, "that the interest conferred in this case amounted to a lease, inasmuch as the party was to have the sole use of that part of the close on which he was to stack his coals."

In *Wallis v. Harrison*, Baron *Parke* adverted to *Winter v. Brockwell* as raising the question, whether "where a license has been executed, and expense incurred by the licensee in so doing, it would be counter-mandable, although the easement was to be enjoyed in the land of the licensor." This point was not judicially before the court in *Wallis v. Harrison*; nor were the cases of *Hewlins v. Shippam* and *Cocker v. Cowper* alluded to; in both of which the license was held to be revocable, although it had been executed, and expense incurred by the licensee, acting under the express permission of the owner of the soil.

Wood v.
Leadbitter.

Since the first edition of this work was published, all the authorities on the subject have been reviewed by the Court of Exchequer in the case of *Wood v. Leadbitter* (*d*). The above doctrine was recognized to the fullest extent. The judgment clearly and authoritatively points out the different effect of a license and a grant; and removes any doubt that may have existed as to the necessity of a deed to create an easement by express agreement. "This was an action," said *Alderson*, B., in delivering the judgment of the court, "tried before my brother *Rolfe* at the sittings after last Trinity to Term. It was an action for an assault and false im-

(z) Si
habeam in Sugden's V. & P. 80, 9th ed.
sero jus tib. vid. vol. 2, 2nd ed., p. 342,
stillicidii in.
et similiter M. & W. 838; see also

Bird v. Higginson, Ex. Ch. 6 A. &
E. 824; and *Perry v. Fitzhove*,
8 Q. B. 757.

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prisonment. The plea (on which alone any question arose) was that at the time of the alleged trespass the plaintiff was in a certain close of Lord Eglintoun, and the defendant, as the servant of Lord Eglintoun, and by his command, laid his hands upon the plaintiff in order to remove him from the said close, using no unnecessary violence. Replication, that, at the time of such removal, the plaintiff was in the said close by the *leave and license of Lord Eglintoun*. The leave and license was traversed by the defendant, and issue was joined on that traverse. On the trial it appeared that the place from which the plaintiff was removed by the defendant was the inclosure attached to and surrounding the great stand on the Doncaster racecourse; that Lord Eglintoun was steward of the races there in the year 1843; that tickets were sold in the town of Doncaster at one guinea each, which were understood to entitle the holders to come into the stand, and the inclosure surrounding it, and to remain there every day during the races. These tickets were not signed by Lord Eglintoun, but it must be assumed that they were issued with his privity. It further appeared, that the plaintiff, having purchased one of these tickets, came to the stand during the races of the year 1843, and was there or in the inclosure while the races were going on, and while there, and during the races, the defendant, by the order of Lord Eglintoun, desired him to depart, and gave him notice that if he did not go away force would be used to turn him out. It must be assumed that the plaintiff had in no respect misconducted himself, and that, if he had not been required to depart, his coming upon and remaining in the inclosure would have been an act justified by his purchase of the ticket. The

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Leadbitter.*

plaintiff refused to go, and thereupon the defendant, by order of Lord Eglintoun, forced him out, without returning the guinea, using no unnecessary violence.

“ My brother *Rolfe*, in directing the jury, told them, that, even assuming the ticket to have been sold to the plaintiff under the sanction of Lord Eglintoun, still it was lawful for Lord Eglintoun, without returning the guinea, and without assigning any reason for what he did, to order the plaintiff to quit the inclosure, and that, if the jury were satisfied that notice was given by Lord Eglintoun to the plaintiff, requiring him to quit the ground, and that, before he was forcibly removed by the defendant, a reasonable time had elapsed, during which he might conveniently have gone away, then the plaintiff was not, at the time of the removal, on the place in question *by the leave and license of Lord Eglintoun*. On this direction the jury found a verdict for the defendant. In last Michaelmas Term Mr. *Jervis* obtained a rule nisi to set aside the verdict for misdirection, on the ground that, under the circumstances, Lord Eglintoun must be taken to have given the plaintiff leave to come into and remain in the inclosure during the races; that such leave was not revocable, at all events without returning the guinea; and so that, at the time of the removal, the plaintiff was in the inclosure by the leave and license of Lord Eglintoun. Cause was shown during last term, and the question was argued before my brothers *Parke* and *Rolfe*, and myself; and on account of the conflicting authorities cited in the argument, we took time to consider our judgment, which we are now prepared to deliver.

“ That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed,

is a proposition so well established that it would be mere pedantry to cite authorities in support. All such inheritances are said emphatically to lie in *grant*, and not in livery, and to pass by mere delivering of the *deed*. In all the authorities and text-books on the subject, a *deed* is always stated or assumed to be indispensably requisite.

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“And although the older authorities speak of incorporeal *inheritances*, yet there is no doubt but that the principle does not depend on the quality of interest granted or transferred, but on the nature of the subject-matter: a right of common, for instance, which is a profit à prendre, or a right of way, which is an easement, or right in nature of an easement, can no more be granted or conveyed for life or for years without a deed, than in fee simple. Now, in the present case, the right claimed by the plaintiff is a right, during a portion of each day, for a limited number of days, to pass into and through and to remain in a certain close belonging to Lord Eglintoun; to go and remain where if he went and remained, he would, but for the ticket, be a trespasser. This is a right affecting land at least as obviously and extensively as a right of way over the land,—it is a right of way and something more: and if we had to decide this case on general principles only, and independently of authority, it would appear to us perfectly clear that no such right can be created otherwise than by deed. The plaintiff, however, in this case argues, that he is not driven to claim the right in question strictly as *grantee*. He contends that, without any grant from Lord Eglintoun, he had license from him to be in the close in question at the time when he was turned out, and that such license was, under

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the circumstances, irrevocable. And for this he relies mainly on four cases, which he considers to be expressly in point for him, viz. *Webb v. Paternoster*, reported in five different books, namely, Palmer, 71; Roll. 143, 152; Noy, 98; Popham, 151; and Godbolt, 282; *Wood v. Lake* (e), *Tayler v. Waters* (f), and *Wood v. Manley* (g).

“As the argument of the plaintiff rested almost entirely on the authority of these four cases, it is very important to look to them minutely, in order to see the exact points which they severally decided.

“Before, however, we proceed to this investigation, it may be convenient to consider the nature of a license, and what are its legal incidents. And, for this purpose, we cannot do better than refer to Lord C. J. *Vaughan*’s elaborate judgment in the case of *Thomas v. Sorrell*, as it appears in his Reports. The question there was as to the right of the crown to dispense with certain statutes regulating the sale of wine, and to license the Vintners’ Company to do certain acts notwithstanding those statutes.

“In the course of his judgment the Chief Justice says (h), ‘A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. As a license to go beyond the seas, to hunt in a man’s park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man’s park, and carry away the deer killed to his own use; to cut down

(e) Sayer, 3.

(f) 7 Taunt. 374.

(g) 11 A. & E. 34; 3 Per & D. 5.

(h) Vaughan, 351.

a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of *eating*, firing my wood, and warming him, they are licenses; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten, and in the wood burnt. So, as in some cases, by consequent and not directly, and as its effect, a dispensation or license may destroy and alter property.'

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"Now, attending to this passage, in conjunction with the title 'License,' in Brooke's Abridgment, from which, and particularly from paragraph 15, it appears that a license is in its nature revocable, we have before us the whole principle of the law on this subject. A mere license is revocable: but that which is called a license is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident.

"It may further be observed, that a license under seal (provided it be a mere license) is as revocable as a license by parol; and, on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an incident to a *valid* grant, and it is therefore revocable. Thus, a license by A. to hunt in

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his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which, without the license, would have been unlawful. If the license be, as put by Chief Justice *Vaughan*, a license not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a license annexed to come on the land: and supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it: he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on my lands, and there to make a watercourse, to flow on the land of the licensee. In such a case there is no valid grant of the watercourse, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and, if it did, then the license would be irrevocable.

“ Having premised these remarks on the general doctrine, we will proceed to consider the four cases relied on by Mr. *Jervis* for the plaintiff. The first was *Webb v. Paternoster*. That, as appears from the report in Rolle, was an action of trespass, brought against the defendant for eating, by the mouths of his cattle, the plaintiff's hay. The defendant justified under Sir William Plummer, the owner of the fee of the close in which the hay was, averring that Sir W. Plummer leased the close to him, and therefore, as lessee, he turned his cattle into the close, and they ate the hay. The plaintiff replied, that, before the making of the lease, Sir W. Plummer had licensed him to place the hay on the close

till he could conveniently sell it, and that before he could conveniently sell it, Sir W. Plummer leased the land to the defendant. The defendant demurred to the replication.

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“From the arguments, as given in Rolle, it appears that the plaintiff’s counsel, who was first heard, contended, first, that the license, being a license for profit, and not merely for pleasure, and being also for a certain time only, namely, till he could sell his hay, was not revocable: and, secondly, even if the license was revocable, still that the lease to the defendant was an implied, and not an *express* revocation, and therefore was inoperative against him without notice; and for this he referred to *Mallory’s case* (i). To this latter proposition the court appears to have assented; but *Dodderidge, J.*, suggested, that, even if the license was in force, still the licenser did not by such a license preclude himself, nor, consequently his tenant, from turning cattle on the land, and that the *licensee* ought to have taken care to protect the hay from the cattle. As to this, however, the Chief Justice expressed a doubt. The defendant’s counsel was heard some days afterwards, and he alleged that it appeared by the record, that the plaintiff had had two years to sell his hay before the defendant’s cattle had eaten it; and he argued that the court would say, as matter of law, that this was more than reasonable time; and to this the court assented. The plaintiff’s counsel, in reply, reverted to the distinction between the license for profit and a license for pleasure; but *Dodderidge* denied it, and said that a license to dig gravel, though a license for profit, is revocable; and he said that the true distinction was between a *mere* license, and a license

(i) 5 Rep. 111.

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coupled with an interest. Judgment was eventually given for the defendant, on the ground that the plaintiff had had more than reasonable time to sell the hay.

“It will be seen, therefore, that the only two points decided were, first, that the question of reasonable time was for the court, and not for the jury; and, secondly, that two years was more than a reasonable time. The decision, therefore, itself has no bearing on the point for which it was cited; and the only support which the case affords to the doctrine contended for by the present plaintiff is what is said, in the report of the case in Popham, to have been agreed by the court, namely, that a license for profit for a term certain is not revocable; a proposition to which, with the qualification we have already pointed out, we entirely accede. It is, moreover, by no means certain that the license in *Webb v. Paternoster* was not a license under seal. The defendant's counsel appears, from the report in Rolfe, to speak of the plaintiff as *grantee* of the liberty to stack hay, &c.; a form of expression not very appropriate, if used in respect of a party who had a mere parol license; and the Chief Justice, according to the report in Popham and Palmer, says that the plaintiff had an interest which charged the land, into whose hands soever it should come. And *Dodderidge, J.*, according to the report in Palmer, arguing that the lessee certainly might turn his cattle into his own field, and was not bound to stop their mouths, says, it was folly of the plaintiff that he did not, *together with the license, take a covenant that it should be lawful for him to fence the hay with a hedge.* From these expressions (and there are others in the various reports of the case having a similar aspect), it certainly seems possible that the license was under seal; and then

the only point would be that which alone was in fact decided, namely, whether, supposing the plaintiff to have acquired by grant a right to stack his hay on the land for a limited time, that limited time had expired. Even supposing the license to have been a mere parol license, yet the strong probability is that Webb had purchased the hay from Sir W. Plummer as a growing crop, with liberty to stack it on the land, and then the parol license might be good as a license coupled with an interest. Be this, however, as it may, the decision, as we have already pointed out, has very little, or rather no bearing on the case before us; and the judgment of *Dodderidge, J.*, as given both in Rolle and Palmer, is in strict accordance with what was afterwards laid down by *Vaughan, C. J.*, and which we consider to be consonant both to principle and authority.

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“The next decision in order of time is that of *Wood v. Lake*, in Sayer, p. 3. There the defendant had, by a parol agreement, given liberty to the plaintiff to stack coals on the defendant's land for a term of seven years. After the plaintiff had enjoyed this privilege for three years, the defendant locked up the gate of the close. No report is given in Sayer of the arguments at the bar. But from a MS. report of the same case, referred to by *Gibbs, C. J.*, in the case of *Tayler v. Waters*, and which MS. we have had an opportunity of consulting, through the kindness of the representatives of the late Mr. Justice *Burrough (k)*, it appears that the argument turned

(k) The following is a copy of the report in the MS. volume of Mr. Justice *Burrough*.

CASE.—A parol agreement that the plaintiff should have liberty of laying and stacking of coals upon

defendant's close, for seven years. Afterwards, defendant forbids plaintiff to lay any more coals there, and shuts up his gates. Defendant says, that plaintiff was but tenant at will. Quære, if this

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wholly on the point whether the privilege of stacking the coals did or did not amount to a lease; for if it did, then the defendant contended it was void after three years, under the Statute of Frauds, as not being in writing. *Lee*, C. J., and *Denison*, J., held it to be

was an interest within the description of the Statute of Frauds.

“Serjeant *Booth*.—This is but a personal license or easement: 1 Roll. Abr. 859, p. 4; Roll. Rep. 143, 152; 1 Saund. 321. A contract for sale of timber growing upon the land has been determined to be out of the statute: 1 Id. Rayn. 182. Vide the difference of a license and a lease, 1 Lev. 194. This must be taken only as a license, for that the coal-loaders also are to have benefit, as well as plaintiff.

“Serjeant *Poole*, for defendant.—Question is, if any interest in land passed by the agreement; for, if interest passed, it is within the statute, ergo void, being for longer term than three years: Bro. License, p. 19; *Thome v. Seabright*, Salk. 24; *Webb v. Paternoster*, Poph. 151. A license to enter upon and occupy land amounts to a lease. The plaintiff not confined to a particular part of the close, and might have covered the whole if he pleased; on that account it is an uncertain interest. The distinction of license to plaintiff and his coal-loader, is nothing; he could not stack the coal himself, and it is merely vague. Easement may be of more value than the inheritance; ex. gr., way-leave.

“*Lee*, C. J.—If this be a lease,

as it is argued, it is within the statute, and void, for not being in writing. No answer as yet is given to the case in *Popham*, when the stacking of hay, which is similar, was determined to be a license. The word *uncertain*, in the statute, means uncertainty of duration, not of quantity. License was not revocable, and here is no case to show this to be considered as a lease.

“*Denison*, J.—This seems not to be an interest, so called in the language of the law, although easements, in general speaking, may be called interests. Had the plaintiff such an interest as to have maintained a *clausum fregit*? Certainly not. If a man licenses to enjoy lands for five years, there is a lease, because the whole interest passes, but this was only a license for a particular purpose.

“*Foster*, J.—These interests, grounded upon licenses, are valuable, and deserve the protection of the law, and therefore may perhaps have been within the intention of the words of the statute.—Desired further time for consideration: stood over.

N.B.—Afterwards, upon motion for judgment the last day of term, and gave judgment for plaintiff, *Foster* non dissentiente.

no lease, nor uncertain interest in land; but *Foster*, J., doubted, and desired time to consider. On the last day of term, the court gave judgment for the plaintiff, *Foster* non dissentiente. *Wood v. Leadbitter.*

“Supposing the court to have been right in deciding that this was not a lease (which, however, is doubted by Sir *E. Sugden*, see 1 V. & P., last edit. p. 139), yet no grounds are stated on which it could be held good as an easement originating merely by parol. Up to this case not a single decision is to be found giving countenance to any such proposition; and we are compelled to say, that, if the court proceeded on the ground that the plaintiff had acquired the easement by the parol license, we do not think it can be supported. But the case may, perhaps, have been decided on another ground. The defendant himself was the party who had agreed to give the easement to the plaintiff; and although the action is stated to have been *an action on the case*, it may have been a mere *assumpsit*—an action on the case on *promises*; and in such an action the plaintiff would certainly be entitled to recover, if the contract was not (and probably the court considered it was not) a contract concerning land, within the 4th section of the Statute of Frauds.*

“The next case on which the plaintiff relies is *Tayler v. Waters*, reported in 7 Taunt. 374. It was an action by the plaintiff against the door-keeper of the Opera-house, for preventing him from entering the house during the performance of an opera. It appeared that one W. Tayler, being in possession of the Opera-house, as lessee for a long term of years, by a deed, dated the

* See *Jones v. Flint*, 10 A. & E. 753; *Wright v. Stavert*, 2 E. & E. 721.

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24th of August, 1792, assigned his interest therein to trustees, on various trusts, for creditors and other claimants, and ultimately in trust for himself. After the execution of this deed, Tayler continued in possession by the permission of the trustees, and he carried on and managed the affairs of the theatre. In March, 1799, he, by deed, granted to one Gourgas, for a valuable consideration, six silver tickets, entitling the holders to admission to the theatre. One of these tickets was sold by Gourgas to the plaintiff, in July, 1799, but no deed of assignment to him was executed. In 1800, Tayler's trustees took possession of the theatre. The plaintiff, however, was allowed to attend the theatre, by virtue of his ticket, until the year 1814, when the defendant Waters, as servant of the trustees, prevented him from entering the theatre; and for this obstruction the action was brought. The cause was tried before C. J. Gibbs, and a verdict found for the plaintiff, and that verdict was afterwards upheld by the Court of Common Pleas. The grounds of the judgment were, that the right under the silver ticket was not an interest in land, but a license irrevocable to permit the plaintiff to enjoy certain privileges thereon; that it was not required by the Statute of Frauds to be in writing, and, *consequently*, might be granted without a deed.

“The Chief Justice, in support of that doctrine, relied on *Webb v. Paternoster*, which, he said, showed that a beneficial license, to be exercised upon land, might be granted without deed, and could not be countermanded, at least after it had been acted on. The same case, he added, showed that the interest was not such an interest in land as was required by the Statute of Frauds to be in writing; as to which last point all doubt, if there

remained any, had (he said) been removed by the case of *Wood v. Lake*.

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“ This judgment is stated by the learned reporter to have comprised the substance of the arguments on both sides, and which, therefore, he does not give in his report. We must infer from this that the attention of the court was not called in the argument to the principles and earlier authorities, to which we have adverted. Brooke, in his Abridgment, *Dodderidge*, in the case of *Webb v. Paternoster*, and Lord *Ellenborough*, in the case of *Rex v. Horndon-on-the-Hill* (1), all state in the most distinct manner that every license is and must be in its nature revocable, so long as it is a mere license. Where, indeed, it is connected with a grant, there it may, by ceasing to be a naked license, become irrevocable: but then it is obvious that the grant must exist independently of the license, unless it be a grant capable of being made by parol, or by the instrument giving the license. Now in *Taylor v. Waters* there was no grant of any right at all, unless such right was conferred by the license itself. C. J. *Gibbs* gives no reason for saying that the license was a license irrevocable, and we cannot but think that he would have paused before he sanctioned a doctrine so entirely repugnant to principle and to the earlier authorities, if they had been fully brought before the court. Again, the Chief Justice is represented as saying that the interest of the plaintiff was not an interest in land within the Statute of Frauds, and that *consequently* it might be granted without deed. How the circumstance, that the interest was not an interest in land within the Statute of Frauds, showed it to be grantable without deed, we cannot discover. The

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precise point decided in *Webb v. Paternoster* is not adverted to, and it is assumed, without discussion, that the license there must have been a parol license, and a naked license, unconnected with an interest, capable of being created by parol. The action was not, as it may have been in *Wood v. Lake*, an action founded on the contract. It was an action on the case for the obstruction, and was founded on the supposition that an actual right to enter and remain in the theatre had vested in the plaintiff, under the license conferred by the silver ticket. With all deference to the high authority from which the judgment in *Taylor v. Waters* proceeded, we feel warranted in saying that it is to the last degree unsatisfactory:—an observation which we have the less hesitation in making, in consequence of its soundness having obviously been doubted by the Court of King's Bench and Mr. Justice *Bayley*, in the case of *Hewlins v. Shippam*.

“The fourth and last case relied on by Mr. *Jervis* was the recent case of *Wood v. Manley*, in the Queen's Bench (*m*). That was an action for trespass *quare clausum fregit*; plea, that defendant was possessed of a large quantity of hay being on the plaintiff's close, and that by leave of plaintiff he entered on the close in question to remove it. Replication, *de injuriâ*. It was proved at the trial, that the hay in question was sold in January, 1838, by the plaintiff's landlord, who had seized it as a distress for rent. The conditions of the sale were, that the purchaser of the hay might leave it on the close until Lady-day, and might in the meantime come on to the close from time to time, as often as he should see fit, to remove it. *These conditions were*

(*m*) 11 Ad. & E. 30; 3 Per. & D. 5.

assented to by the plaintiff. The defendant became the purchaser, and afterwards, and before Lady-day, the plaintiff locked up the close. The defendant broke open the gate in order to remove the hay. A verdict was found for the defendant, *Erskine, J.*, telling the jury that the license to come from time to time to remove the hay was irrevocable. Mr. *Crowder* moved to set aside this verdict, on the ground that the license was necessarily revocable, and was in fact revoked. But the Court of Queen's Bench refused to grant a rule, and, we think, quite rightly. This was a case, not of a mere license, but of a license coupled with an interest. The hay, by the sale, became the property of the defendant, and the license to remove it became, as in the case of the tree and the deer, put by C. J. *Vaughan*, irrevocable by the plaintiff; and the rule was properly refused. The case was analogous to that of a man taking my goods, and putting them on his land, in which case I am justified in going on the land and removing them; Vin. Abr. Trespass, (II) a 2, pl. 12; and *Patrick v. Colerick* (n).*

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“ It appears, therefore, that the only authority necessarily supporting the present plaintiff in the proposition for which he is contending, is the case of *Tayler v. Waters*, in which the real difficulty was not discussed, nor even stated. It was taken for granted, that, if the Statute of Frauds did not apply, a parol license was sufficient, and the necessity of an instrument under seal, by reason of the interest in question being a right

(n) 3 M. & W. 483.

* *Cornish v. Stubbs*, L. R., 5 C. P. 334; *Carrington v. Roots*, 2 M. & W. 248; *Williams v. Morris*, 8 M. & W. 488.

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in nature of an easement, was by some inadvertence kept entirely out of sight; and for these reasons, even if there had been no conflicting decisions, we should have thought that case to be a very unsafe guide in leading us to a decision, on an occasion where we were called on to lose sight of the ancient landmarks of the common law.

“ We are not, however, driven to say that we shall disregard that case *merely* on principle. Giving it the full weight of judicial decision, it is met by several others, which we must entirely disregard, before we can adopt the argument of the plaintiff. In the cases of *Fentiman v. Smith* (o), and *Rex v. Horndon-on-the Hill* (p), which were before *Tayler v. Waters*, Lord *Ellenborough* and the Court of King’s Bench expressly recognized the doctrine, that a license is no grant, and that it is in its nature necessarily revocable, and the further doctrine, that, in order to confer an incorporeal right, an instrument under seal is essential. And in the elaborate judgment of the Court of King’s Bench, given by *Bayley, J.*, in *Hewlins v. Shippam* (q), the necessity of a deed, for creating any incorporeal right affecting land, was expressly recognized and formed the ground of the decision. It is true that the interest in question in that case was a freehold interest, and on that ground *Bayley, J.*, suggests that it might be distinguished from *Tayler v. Waters*; but in an earlier part of that same judgment, he states, conformably to what is the clear law, that, in his opinion, the quantity of interest made no difference; and the distinction is evidently adverted to by him, not because he entertained the opinion that

(o) 4 East, 107.

(q) 5 B. & C. 222.

(p) 4 M. & Sel. 565.

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it really was of importance, but only in order to enable him to decide that case without, in terms, saying that he did not consider the case of *Tayler v. Waters* to be law. The doctrine of *Hewlins v. Shippam* has since been recognized and acted upon in *Bryan v. Whistler* (r), *Cocker v. Cowper* (s), and *Wallis v. Harrison* (t), and it would be impossible for us to adopt the plaintiff's view of the law, without holding all those cases to have been ill decided. It was suggested that, in the present case, a distinction might exist, by reason of the plaintiff's having paid a valuable consideration for the privilege of going on the stand. But this fact makes no difference; whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorized its being issued and sold to him, is a point not necessary to be discussed; any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going upon the stand, in spite of the owner of the soil; and it is sufficient, on this point, to say, that in several of the cases we have cited, (*Hewlins v. Shippam*, for instance, and *Bryan v. Whistler*), the alleged license had been granted for a valuable consideration, but that was held not to make any difference. We do not advert to the cases of *Winter v. Brockwell* (u) and *Liggins v. Inge* (x), or other cases ranging themselves in the same category, as they were decided on grounds inapplicable to the case now before us, and were in fact admitted not to bear upon it.

“In conclusion, we have only to say, that, acting

(r) 8 B. & C. 288.

(u) 8 East, 308.

(s) 1 C., M. & R. 418.

(x) 7 Bing. 682.

(t) 4 M. & W. 538.

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upon the doctrine relative to licenses, as we find it laid down by Brooke, by Mr. Justice *Dodderidge*, and by C. J. *Vaughan*, and sanctioned by *Hewlins v. Shippam*, and the other modern cases proceeding on the same principle, we have come to the conclusion that the direction given to the jury at the trial was correct, and that this rule must be discharged.—Rule discharged” (y).

[In the case of *Perry v. Fitzhove* (z), A. having a right of common, appurtenant to Blackacre, over land called the Heath, gave B. a parol permission to build a house on the Heath. B. built in pursuance of the license. Blackacre afterwards came by assignment to C., who pulled down the building, and upon an action of trespass being brought by B., C. pleaded, inter alia, a justification under an immemorial right of common appurtenant to Blackacre, over the Heath. The court held that to that plea it was a bad replication, that A. had given the license, and that B. had built the house under that license; on the ground that the plaintiff was setting up a grant of a freehold interest, binding the inheritance of Blackacre by restricting the right of common appurte-

[(y) *Taplin v. Florence*, 10 C. B. 744, acc. In the case of *Bell v. Midland Railway Company*, 3 De Gex & Jones, 673, coram the Lords Justices, it was attempted to apply the authority of *Wood v. Leadbitter* to a case where an act of parliament, having authorized the owners of lands adjoining a railway to construct branch railways or sidings, so as to form continuous communication from their own lands to the railway, with a provision for the settlement by justices of any dispute as to the proper

place for the sidings, the plaintiff had constructed and used a siding at a particular spot with the assent of the company, which they afterwards attempted to revoke, relying upon the authority of *Wood v. Leadbitter* and the class of cases of which it is one, but without success, the court holding that those authorities have no bearing upon such a case; nor can they be set up by a mere wrongdoer, against the possessory right of a licensee; *Northam v. Hurley*, 1 E. & B. 665.]

(z) 8 Q. B. 757.

nant to it, and that such grant must be by deed under seal. It was argued that the case fell within the principle of the authorities, as to the effect of a parol license executed in extinguishing an easement; so that the right of common might be considered to be extinguished in the spot on which the building was erected. The judgment does not advert to the distinction between the effect of a license operating, when acted upon, by way of extinguishment of an existing right, and one operating by way of grant of a right to interfere with that right, supposing it not to be extinguished, for it is laid down by the court that the license could only operate, if at all, in the last-mentioned way, which it clearly could not do; and having regard to this and also to the peculiar nature of a right of common appurtenant by prescription, which is in its nature entire (*a*), and an extinguishment of which by act of its owner in any part of the land over which it is claimed works at common law an extinguishment of it over the whole (*b*); and further to the fact that it did not appear that the licensee had any interest in the land upon which he was licensed to build, the judgment cannot be said to be opposed to the authorities above referred to, as to the binding effect of a license given by the owner of a dominant tenement to the owner of the servient, to erect some permanent structure on his own land, inconsistent with the continuance of the easement. It is difficult, however, to reconcile the opinion expressed by the court, that the doctrine of such cases as *Winter v. Brockwell* only applies as between

[(*a*) See the distinction in this respect between a right acquired under Lord Tenterden's Act and by prescription at the common law

explained in *Davies v. Williams*, 16 Q. B. 558.]

[(*b*) Co. Lit. 122 a; 4 Rep. 38 a; Cruise, Dig. Title XXIII., Common, §§ 48, 82.]

the original licenser and the licensee, and would not bind an assignee of the former, with the interpretation of that case in the authorities already cited in this chapter, and those which will be found collected post, Part III. Chap. II. Sects. 2, 3, as to the extinguishment of easements, where the distinctions between the different kinds of easements and profits à prendre, in respect of this question, are noticed (c).]*

[(c) Although, at law, there exists the necessity for a grant under seal, yet the Court of Chancery in many cases restrains the application of this rule by persons who, having either by their express consent, or such acquiescence as would make it a fraud in the view of that court to insist upon the legal right, induced others to incur expense in the execution of permanent works or the like, afterwards seek to deprive them of the benefit of their expenditure, by reason of the want of a complete legal title. For example, in the case of the *Duke of Devonshire v. Eglin*, 14 Beav. 530, where expense had been incurred in constructing a watercourse through

defendant's lands, with his consent, but without any grant under seal, and after a user of nine years, the defendant attempted to interfere, he was restrained, upon terms, by perpetual injunction from interfering with the further user of the watercourse. See also *Powell v. Thomas*, 6 Hare 300; *Laird v. Birkenhead Railway Company*, 1 Johnson, 500; *Duke of Beaufort v. Patrick*, 17 Beav. 60; the judgment of the Master of the Rolls in *Bankart v. Houghton*, 27 Beav. 425; *Somerset Canal Company v. Harcourt*, 24 Beav. 571; on appeal, 2 De G. & Jones, 603; *Morland v. Richardson*, 22 Beav. 596. The like rules are applicable to cases in which those

Adams v. Andrews.

* In *Adams v. Andrews*, 15 Q. B. 284, to an action for disturbance of the plaintiff in his pew the defendant pleaded an agreement by the plaintiff with him and his co-churchwarden to divide the pew, and that he divided it accordingly and incurred expense. The plaintiff replied a revocation of the agreement. The court held, on the authority of *Wood v. Leadbitter*, that as there was no deed, and therefore no grant, the plaintiff could revoke the license, notwithstanding the expense incurred by the defendant.

Equitable right.

There may be an equitable right to an easement without deed. Equity follows the law. If it did no more, it would be of little use. Equity follows the law to supply its defects. Equity regards not the circumstance but the substance of the act, and looks upon things agreed to be

who have consented to or acquiesced in the execution of permanent works interfering with their own enjoyment of easements already acquired and existing, attempt afterwards to set up and rely upon such easements. These principles of equity will not be in many instances available under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 83, which empowers the courts of law to receive equitable defences by way of plea for two reasons: first, such facts are only available in a court of law by way of defence or answer to a defence; and, secondly, because equitable defences are only allowed of by the courts of law upon grounds upon which the Court of Chancery would grant a perpetual and unconditional injunction; and it will be found upon a perusal of the cases referred to, that the Court of Chancery generally annexes conditions to the grant of such relief. It will be perceived how much the im-

portance of the questions discussed above in this chapter, and in Part. III. Ch. II. Sect. 3, on the extinguishment of easements, is diminished by the existence of this head of equity, as in most cases where the question is whether an easement has been extinguished, the facts bring the case within the jurisdiction of the Court of Chancery without regard to the purely legal question, so that it is competent for the litigant, if so minded, to take refuge in the Court of Chancery from the discussion of such questions. *Daries v. Marshall*, 10 C. B., N. S. 697, was a case where, to an action for obstructing ancient lights, it was held that it would be good equitable defence that the plaintiff had consented to the construction of the obstructing building, and that it was a good answer by way of replication to that defence, that the consent of the plaintiff had been obtained by false representations of the defendant.]

done as actually performed. (Francis' Maxims, 13; Fonb. Eq. B. 1, c. 6, s. 9.) If, therefore, there is an agreement to grant an easement for a good and substantial consideration (Com. Dig., Chan. 2 C. 8 & 9), equity considers it as granted, and will either decree a legal grant or restrain a disturbance by injunction.

In *East India Co. v. Vincent* (2 Atk. 83), it would appear that the agent of the company and the defendant, a packer, agreed that the company should be at liberty to build on the defendant's ground, or with windows overlooking his ground, and that they should employ him during the term of his estate double to any other packer, provided he worked at the same rate as any other packer. As they did not employ him as agreed, he built a wall to block up their light, and Lord Hardwicke held that he ought to have brought his bill to establish the agreement, and decreed that the wall should be pulled down and that the company should perform the agreement to employ.

*East India Co.
v. Vincent.*

In *Duke of Devonshire v. Eglin* (14 Beav. 530), the defendant con-

*Duke of Devon-
shire v. Eglin.*

sented to the plaintiff making a watercourse through his land on being paid a proper compensation. The watercourse was made, but no grant was executed and no sum arranged. After nine years user the defendant stopped it up; he was restrained by decree from so doing, and it was referred to the Master to settle a proper compensation.

Moreland v. Richardson.

In *Moreland v. Richardson* (22 Beav. 596; 25 L. J., Ch. 883; 26 L. J., Ch. 690), the plaintiffs had purchased graves in a burying-ground attached to the Tottenham Court Road Chapel, and received receipts for their purchase-money, stating that the graves were sold in perpetuity. The Master of the Rolls held that they were entitled to have their family vaults, and the spot on which they were situate, kept undefaced and unobliterated, and enjoined the defendant from removing, defacing, obliterating or injuring the graves and monuments belonging to the plaintiff.

Frogley v. Earl Lovelace.

In *Frogley v. Earl Lovelace* (1 John. 333), a landlord was restrained from interfering with his tenant in the exclusive right of shooting according to an agreement not under seal, until a lease should be executed under seal according to the agreement.

Acquiescence.

An agreement to grant an easement may be inferred from the acquiescence of the owner of the servient tenement. The rule as to acquiescence is thus stated by Lord Eldon in *Dann v. Spurrer* (7 Ves. 235): "The court will not permit a man knowingly, though passively, to encourage another to lay out money under an erroneous opinion of title (and the circumstance of looking on is in many cases as strong as using terms of encouragement)—a lessor knowing and permitting those acts which the lessee would not have done, and the other must conceive that he would not have done, but upon an expectation that the lessor would not have thrown any obstacle in the way of his enjoyment."

Dann v. Spurrer.

Ramsden v. Dyson.

In *Ramsden v. Dyson* (L. R., 1 H. Lds. 140), Lord Cranworth, C., says: "If a stranger begins to build on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen it was my duty to be active and state my adverse title; and that it is dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented." Lord Kingsdown (p. 170) says: "The rule appears to be this. If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord, that he shall have a certain interest, takes possession

of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation." (Cited by *James, V.-C., Bankart v. Tennant*, L. R., 10 Eq. 146.)

In the *Watercourse case* (2 Eq. Abr. 522, pl. 3), A. diverted a watercourse, which put B. to great expense in laying of soughs, &c., and the diversion being a nuisance to B., he brought an action, but an injunction was decreed, it being proved that B. did see the work when it was carrying on, and connived at it, without showing the least discouragement, but rather the contrary. A case of *Short v. Taylor*, before Lord *Somers*, was cited, where Taylor, in building his house, laid his foundations on Short's land, he standing by and encouraging him. An injunction was granted against his proceeding with an action for the trespass.

Watercourse case.

Clavering's case, cited by Lord *Loughborough* (5 Ves. 490). He says: "There was a case (I do not know whether it came to a decree) against Mr. George Clavering, in which some person was carrying on a project of a colliery, and had sunk a shaft at a considerable expense. Mr. Clavering saw the thing going on, and in the execution of that plan it was very clear that the colliery was not worth a farthing without a road over his ground, and when the work was begun he said he would not give the road. The end of it was—I do not know whether it was by decree or not—that he was made to give the road at a fair value." (Cited by *James, V.-C., Bankart v. Tennant*, L. R., 10 Eq. 147.)

Clavering's case.

Williams v. Earl of Jersey (1 Cr. & Ph. 91) was a suit to restrain the defendant from suing at law for a nuisance caused by copper works, erected by the plaintiff at a great expense, and it was alleged that during the progress of the works the defendant told the plaintiff that they were being erected and were for the smelting of copper; nevertheless, he allowed the defendant to proceed and expend large sums of money thereon, and in completing and finishing the same with the requisite machinery and plant, without making any objection, and that he acquiesced in and encouraged the erection and expenditure. A demurrer to the bill was overruled.

Williams v. Earl of Jersey.

In *Powell v. Thomas* (6 Hare, 300), a colliery proprietor had constructed a railway from his colliery across the lands of several persons by agreement, and wrote to the defendant, across whose land he required to carry the railway, referring to the act of parliament, and offering to pay for the land at a fair valuation. The defendant did not reply, and the railway was made across his land. A year or two afterwards the parties met, but did not agree as to the price. Three or

Powell v. Thomas.

four years after the railway was made the defendant brought ejectment. The plaintiff filed a bill charging acquiescence. The court restrained the defendant from issuing execution on the plaintiff paying into court a sum not less than the utmost value of the land.

*Rochdale
Canal Co. v.
King.*

In *Rochdale Canal Co. v. King* (2 Sim., N. S. 78), there was a motion to restrain the defendants, mill owners, from drawing water from the canal for any purpose other than for condensing steam (which was allowed by the Canal Act). The defendants, by their answer, stated that when their mill was erected notice was given to the company of the intention to make a communication with the canal, not only for the purpose of condensing steam, but for other purposes; that the company superintended the laying of the pipes, and were aware of the uses to which they were to be applied, and made no objection, though they were cognizant of the great expense incurred. Lord *Cranworth*, V.-C., said: "If this be true, the plaintiffs can have no relief in this court, such conduct, even if it be insufficient to sustain a plea of leave and license in bar to the action, certainly incapacitated the plaintiffs from obtaining any assistance in a court of equity. It is unnecessary to go further, and say whether it would not entitle the defendants to restrain them from proceeding at law according to what is stated by Lord *Eldon* in *Barrett v. Blagrove* (6 Ves. 105): "I certainly assented to the argument very ably urged by Mr. Baily, that mere acquiescence, if by acquiescence is meant the abstaining from legal proceedings, is unimportant. Where one party invades the right of another, that other does not in general deprive himself of the right of redress merely because he remains passive—unless, indeed, he continues inactive so long as to bring the case within the purview of the Statute of Limitations. If, therefore, from 1830 to 1847, when the disputes began, the plaintiffs might have asserted their legal right on which they could insist, their not having done so during that period would not prejudice them. But the evidence of long-continued use of the water for all purposes by the adjacent mill-owners may be very important as tending to satisfy this court that when the defendant's mill was erected the plaintiffs must have known that King, who was building it, was laying out his money in the expectation that he would have the same privilege of using the water as was enjoyed by all his neighbours."

Duke of Beaufort v. Patrick.

In the *Duke of Beaufort v. Patrick* (17 Beav. 60), a canal was made through lands by a lessee with the consent of the lessor; it was afterwards enlarged under the powers of a Canal Act with the full consent and approbation of the lessor, who, at the expiration of a lease, recovered judgment in ejectment on the ground that he had not conveyed any title to the proprietors of the canal. It was contended on the authority of *Clare Hall v. Harding* (6 Ilare, 273), and *Pilling v. Armitage* (2 Ves. 78), that the encouragement given by him to the

lessee to make the canal did not affect his reversion ; but the court held that as it was enlarged under the act of parliament with his approbation, his permission was permanent, that he was bound to sell the land to the proprietors of the canal at its fair and reasonable value, which was assessed by the court.

In *Somerset Canal Co. v. Harcourt* (24 Beav. 271; 2 De G. & J. 296), the company, during the infancy of Earl Waldegrave, made their canal over his lands in the possession of his lessees, and paid the lessees the value of their interest. When the earl came of age he entered into arrangements with the company, which, though not of a permanent character, might at any time have been rendered permanent by the company, and received from them an annual rent for several years. The Lord Chancellor said : " It is true this is not exactly the case of a party having a right standing by and seeing another dealing with the property in a manner inconsistent with such right, and making no objection while the act was in progress. But are not the parties in an equivalent position by the company having converted the earl's lands for the purposes of their canal, to which they were absolutely necessary; and using them day by day for this object without any attempt on his part to disturb them, he well knowing that if such attempt were made they could compel him to sell them the land ? The defendant cannot, in my opinion, after thus lulling the company into security and confidence, and preventing their exercise of the powers which they possessed by law, turn round upon them, and attempt to remove them from the land which they have possessed for so many years. He must therefore, in my opinion, be restrained from pursuing such an inequitable course and endeavouring to act upon his notice to quit. On the other hand, the company ought not to be allowed to remain under the present embarrassing state of their relations with the defendant. They must take prompt measures for ascertaining the compensation to be paid to the defendant, and making themselves owners of the land under the powers of their act of parliament."

*Somerset
Canal Co. v.
Harcourt.*

In *Laird v. Birkenhead Railway Co.* (John. 500), the plaintiff, under a treaty with the defendants for a communication between his shipbuilding yard and their station, constructed a tunnel and laid down rails at an expense of 1,200*l.*, and was allowed by the company to use it for two and a half years, during which time they received from him tolls for the use of the way. Because they did not finally agree as to terms the company gave him three months' notice to quit, and were about to take up the rails, but were restrained by the Vice-Chancellor, who held that, notwithstanding their being a corporation, they were as much bound by their acquiescence as an individual, and were bound to allow the plaintiff the use of the way on reasonable terms and for a reasonable time, which he considered to be for as long as the plaintiff

*Laird v.
Birkenhead
Railway Co.*

continued owner of the yard. In *Cook v. Seaford* (L. R., 6 Ch. 551), it was held that a municipal corporation were bound by acquiescence in the same case as an individual.

Cotching v. Bassett.

In *Cotching v. Bassett* (32 Beav. 101), the plaintiffs were lessees of No. 32, Wood Street, and the defendants owners of No. 33, which, until Michaelmas, 1861, was let to plaintiffs. The plaintiffs being about to rebuild No. 32, agreed with the defendants that they should continue tenants of No. 33 to Lady Day, 1862, and rebuild the party-wall. In rebuilding they altered the windows and made additional windows, and submitted their plans to the defendants' surveyor, and the works were executed under the superintendence of the defendants' surveyor, who made no objection to the plans as to the mode in which the works were being carried out. After the plaintiffs had completed their building, the defendants gave them notice of their intention to raise the party-wall in a manner greatly to interfere with the plaintiffs' lights. The Master of the Rolls restrained them, holding that the case came within the principle of *Dann v. Spurrier*, saying, "If it was the intention of the defendants to derive any advantage from the acts of the plaintiffs it was incumbent on them to inform the plaintiffs of it in such a way that they could not be misunderstood."

Davies v. Sear.

Davies v. Sear (L. R., 7 Eq. 427). The defendant purchased the lease of a house, part of a plot of land laid out for building by his vendor, with an archway and road through it leading to a place intended for a mews. At the time of his purchase there was access to the mews over other land of his vendor. The plan was to build over it, and it afterwards was built over, when the only access to the mews was through the archway. He allowed the archway to be used as a passage to the mews until the plaintiff had built houses so as to cut off all access to the mews except through the archway. He then obstructed the way through the archway. Lord Romilly, M. R., said: "The question whether the defendant had a right to shut up the archway depended upon whether an easement was reserved by implication on the assignment of the house, and that depended upon whether the easement was apparent and also a way of necessity. He held that it was a way of necessity because the defendant saw distinctly the archway, and bought the house subject to the archway, and was put upon inquiry as to the mode in which the lessees were bound to perform, and about to perform the building contract they had entered into. He agreed that the case of *Dann v. Spurrier*, and other cases of that class, applied."

Blanchard v. Bridges.

On the other hand, in *Blanchard v. Bridges* (4 Ad. & El. 194), the owner of the dominant tenement had made alterations in his windows. The owner of the servient tenement was often on the spot during the progress of the works, and had a general knowledge of the

nature of the alterations and made no objection. The Court of Queen's Bench, who had power to draw any conclusion which a jury ought to have drawn, were invited to presume that an easement for light to the windows had been granted, but declined, saying, "The fullest knowledge, with entire but mere acquiescence, cannot bind a party who has no means of resistance." The decision in Equity would probably be the same. In *Cotching v. Bassett* there was acquiescence and encouragement; in *Blanchard v. Bridges*, acquiescence only. (See *Lady Stanley of Alderley v. Earl of Shrewsbury*, 10 W. N. 71.)

In *Bankart v. Houghton* (27 Beav. 425), the plaintiff sought to restrain the defendant from enforcing a judgment at law in an action for a nuisance caused by copper works, on the ground that when he took his farm he was aware of the works, and his lessor had seen them erecting, and took no steps to prevent their erection. The Master of the Rolls held that this was not an acquiescence which conferred on the plaintiff the right to cause noxious effluvia and vapour to issue from his furnaces and be deposited on the defendant's lands. He also said, "It is impossible to hold that because a man has acquiesced in certain works which produce little or no injury, he is ever afterwards to be debarred of remedy if, by the increase of the works, he sustains a serious injury." See also *Tipping v. St. Helen's Smelting Co.* (L. R., 1 Ch. 66).

In *Bankart v. Tennant* (L. R., 10 Eq. 141), the defendant being the owner of a canal of which the plaintiffs were customers, there was an understanding that so long as they were customers they should have the use of the waste water of the canal for certain furnaces and smelting works which they erected on its banks. James, V.-C., held that this did not give them any equitable right to the water, though he said that, if it had been made out to his satisfaction that the water was essential, or "any thing like essential to the enjoyment of the plaintiffs' property, he should have found his way of giving them the relief they asked—viz., have compelled the defendant to give them the use of the water on reasonable terms on the authority of *Clavering's case*.

By the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), in any cause or matter commenced in the High Court of Justice, law and equity is to be administered by the court according to certain specified rules, one of which is: If the plaintiff claims to be entitled to an equitable estate or right he is to have such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose instituted before the act (sect. 24). Notwithstanding this provision the distinction between law and equity must still be regarded. If a legal estate in an easement is granted by deed the consideration is immaterial. A claim for damages may be founded for breach of an agreement to grant an easement if

SECT. 2.—*Construction of Instruments.*

Mode of granting.

Easements may be granted either separately, and apart from any conveyance of the dominant tenement, or they may be included in a conveyance of it.

Separate grant of an easement.

But few cases are to be found in the books of a grant of an easement *per se* (*d*); it is obvious, however, that, in all instances of this kind, the precise words of the instrument itself must determine the extent of the right created (*e*).

[(*d*) *Northam v. Hurley*, 1 E. & B. 655, is an instance of such a grant.]

(*e*) See as to the construction of grants of easements and the

manner of determining the extent of them, post, Part II., Chapter III., "Extent and Mode of Enjoyment."

there is any consideration for the agreement; but to claim an equitable estate in an easement by agreement not under seal, there must be a substantial consideration at least equal in value to the easement claimed—according to the maxim, Equality is Equity.

Equitable transfer of contracts to use land.

In Equity, if there is a covenant or agreement between the owner of land and his neighbour purchasing part of it to use or abstain from using the land in a particular way, as for a pleasure-garden or a prospect, the court will restrain any person taking the land with actual or constructive notice of the covenant from violating it. (*Tulk v. Moxhay*, 2 Phil. 774; *Western v. M'Dermott*, L. R., 1 Eq. 499; 2 Ch. 72; *M'Lean v. M'Kay*, L. R., 5 P. C. 327.) A lessee has constructive notice of all the covenants by which his lessor is bound, because he might and ought have inquired as to such covenants (*Fielden v. Slater*, L. R., 7 Eq. 523); and the purchaser of land in a marsh protected by a sea-wall is set upon inquiry to ascertain how the sea is kept out, and who pays for the maintenance of the sea-wall. (*Morland v. Cook*, L. R., 6 Eq. 264.) Such covenants cannot be enforced by subsequent purchasers from the covenantee, unless he was manifesting his intention of transferring the benefit of the covenant to them. (*Keates v. Lyon*, L. R., 4 Ch. 218.)

These cases depend on the same principle of equity. On every transfer of the properties intended to be affected by the agreement, the contract as to the use of the property is supposed to be renewed with the new proprietor, and thus licences in the nature of easements, as in *Ackroyd v. Smith* (10 C. B. 164), not transferable at law, are continued.

A covenant, or other instrument under seal, clearly evincing the intention of the parties, may operate as a grant (*f*).*

So a man may claim a way by grant; as if A. grants that B. shall have a way through his close (*g*).†

Easements, in general, bear a strong resemblance to covenants running with the land, both express and implied. [47]
Covenants running with the land.

Upon a grant or covenant conferring an easement, the successive owners of the dominant estate, who, in the case of an ordinary covenant, would, at common law, be strangers to the contract, become entitled to the benefit of the rights conferred, and may sue for a violation of them.

[The better opinion being, that the burden of covenants does not run with the land, so as to bind an assignee, except in cases between landlord and tenant(*h*), it

(*f*) *Holms v. Seller*, 3 Levinz, T. R. 560; *Gerrard v. Cooke*, 2 Bos. & Pul. N. R. 102.
305. [See the judgment of Lord
Wensleydale in *Ronbotham v.* (*h*) See notes to *Spencer's case*,
Wilson, 8 II. of L. p. 362.] Smith's L. C. vol. i. p. 74, 5th ed.
(*g*) Com. Dig. Chimin, D. (3); by F. P. Mauds and T. E. Chitty.‡
see also *Senhouse v. Christian*, 1

* A clause in an agreement for re-building, that such of the windows and lights in the new house as should occupy the site of ancient lights should have all the rights of ancient lights, was construed as a grant of the easement of light to such windows over any land of the lessor. (*Low v. Innes*, 10 Jur., N. S. 1037.)

† An easement cannot be reserved; if a conveyance of land provides for an easement to the grantor it operates, if executed by the grantee, as a grant to the grantor, or it may be conferred on a stranger to the deed. (*Doe d. Douglas v. Lock*, 2 A. & E. 743; *Wickham v. Hawker*, 7 M. & W. 76; *Durham and Sunderland Railway Co. v. Walker*, 2 Q. B. 967; *Proud v. Bates*, 11 Jur., N. S. 441; 34 L. J., Ch. 406; see *Pannell v. Mill*, 3 C. B. 636; *Duke of Hamilton v. Graham*, L. R., 2 II. Lds. (Sc.) 166.

‡ Per Willes, J., *Bailey v. Stephens*, 12 C. B., N. S. 112.

becomes important to determine in each case whether the terms of the covenant are such as to create a grant of an easement, in which case the effect of them is to create an incorporeal hereditament, giving the successive owners of it a right as against all the succeeding owners of the land affected by it, without regard to any question as to burden of covenants running with land. In *Rowbotham v. Wilson* (i), where the plaintiff sued the defendant for damage done to land and houses, by the defendant so working the subjacent minerals as to let down the surface, much discussion took place as to the effect of a covenant by the owner of land that the owner of certain minerals under it shall have a right to work the minerals, without liability for letting down the surface, the defendant relying, amongst other points, upon the effect of such a covenant; and Lord Wensleydale pointed out that such a covenant would operate as a grant, and that the grantee in that way would obtain the right to work the minerals in the manner claimed. His lordship said: "This was no doubt the proper subject
" of a grant, as it affected the land of the grantor; it was
" a grant of a right to disturb the soil from below and
" alter the position of the surface, and is analogous to
" the grant of right to damage the surface by making
" a way over it. No particular words are necessary for
" such a grant; any words which clearly show the in-
" tention to give an easement which is by law grantable
" are sufficient to effect that purpose. If the words
" used could only be read as amounting to a covenant,
" it must be admitted that such a covenant would not
" affect the lands in the hands of the assignee of the
" covenantors, but if they amount to a grant the grant

(i) 8 H. of L. Cas. 362.

“ would be unquestionably good and bind the subsequent owners.”

Some of the learned judges in the Court of Exchequer Chamber, when the same case was before that court, appear to have been of opinion that a covenant by the owner of land, that the owner of the minerals under it, or of a right to get minerals, might work without liability for damage to the surface, could only operate as a mere covenant not to sue, and therefore would not bind an assignee of the land; not recognizing the analogy pointed out by Lord Wensleydale between such a right and the right to damage the surface by making a way over it.

It is hardly necessary to point out that the principle involved in the judgment of Lord Wensleydale would be equally applicable to a grant of the right to let down the surface by working underneath made “per se” to a person already the owner either of the whole subjacent soil, or of the right to work certain minerals in that soil, as to the case where the two rights are conferred by the same instrument, as in *Rowbotham v. Wilson*.

In all such cases the questions would appear (without regarding the particular *form* of words used) to be:—
1. Does an intention appear to confer a right to affect the land of the grantor or covenantor? 2. Is this right one of those as to which, either from decided cases or by analogy, it can be said that it is a right capable of being made the subject of a grant as an easement? If these two questions be answered in the affirmative an easement has been created, and the grantee and his assignees have the right, as against the grantor or his assignees, without reference to any question as to the

burden of covenants running with the land, so as to bind an assignee (*k*).]

Tenements
pass with their
attendant ease-
ments.

Where the dominant tenement itself is conveyed, whether in fee or for any less estate, it should seem that all rights which the conveying party enjoyed, by virtue of, and as appendant to, his estate, as against third parties pass with it (*l*).*

Divisibility of
easements.

There appears to be no authority in the English law on the effect of a division and transfer to several persons of the dominant tenement (*m*). Merlin (*n*) expresses

✓ [(*k*) It may be here noticed, that any covenant made by the purchaser of land, that he and his assigns will use or abstain from using his land in any particular way, may be enforced in equity against all purchasers with notice of the covenant, without regard to the question whether such covenant runs with the land or not; see the judgment of Lord *Cottenham* in *Tulk v. Moxhay*, 2 Phil. 774; and this equity may be had recourse to in those cases in which the right attempted to be granted is not one of those which can be clothed with the legal character of an easement.]

(*l*) 11 H. 6, 22, pl. 19; 2 Rolle,

Abr. 60, pl. 1; *Beaudely v. Brook*, Cro. Jac. 289; *Fentiman v. Smith*, 4 East, 107; *Canham v. Fisk*, 2 Cr. & J. 126.

[(*m*) But see the judgment of Bayley, J., in *Codling v. Johnson*, 9 B. & C. 934, as to the apportionment of a right of way on the division of a common amongst allottees; and see as to pews, *Harris v. Drewe*, 2 B. & Ad. 164; as to common, *Wyat Wild's case*, 8 Rep. 78 b; *Tyrringham's case*, 4 Rep. 36 b; and see post, Part II. Ch. III., Extent and Mode of Enjoyment.]

(*n*) Répertoire de Jurisprudence, tit. Servitude, p. 45, and see post, Part II. Ch. III.

* A right of way appurtenant to land passes to the lessee on a demise of the land. (*Skull v. Glenister*, 16 C. B., N. S. 81; *Thorpe v. Brumfitt*, L. R., 8 Ch. 650.)

Covenant for
quiet enjoy-
ment.

A covenant for quiet enjoyment, whether express or implied, extends to an easement parcel of the demise. (*Pomfret v. Ricraft*, 1 Saund. 322; *Andrews v. Paradise*, 8 Mod. 318; *Morris v. Edgington*, 3 Taunt. 24.) But it does not enlarge the grant so as to confer an easement not within the grant (*Blatchford v. Mayor of Plymouth*, 3 Bing. N. C. 691; *Potts v. Smith*, L. R., 6 Eq. 311; *Booth v. Aloock*,

his opinion, that wherever the object of a servitude is, from its nature, capable of a division, it may be divided. A right, for example, of drawing water from a well, to the extent of fifty buckets a day, may be divided, if the house is capable of division; and, if the house is divided into two parts, there is nothing to prevent each of the divided parts (*chacune de ces deux maisons*) from having in this water drawing (*puisage*) a right equal or unequal according to the stipulations of the instrument of partition. So if a man is bound by a servitude not to raise his wall above a certain height, there is nothing to prevent his being liberated from this burden in part, and, consequently, no reason why it should not be considered divisible.

Questions of difficulty arise where there has been a unity of ownership of the dominant and servient tenements, and where, consequently, all easements have been merged in the general rights of property (*o*). Express grant
by owner of
two tenements.

Where such easements are in their nature continuous and apparent, they pass upon a severance of the tenements, by implication of law, without any words of new grant or conveyance. Indeed, properly speaking, such easements are not revived, but newly created, by an implied grant. This subject is considered in the next chapter.

The same observation applies to easements, commonly called "of necessity" (*p*).

(*o*) *Morris v. Edgington*, 3 Taunt. 24. (*p*) Post, Chap. IV.

L. R., 8 Ch. 663; *Leech v. Schweder*, L. R., 9 Ch. 463), or an easement to which the grantor was not entitled (*Thackeray v. Wood*, 5 B. & S. 825; 6 B. & S. 766).

[48] Other easements, such as ordinary rights of way, will not pass upon a severance of the tenements, unless the owner "uses language to show that he intended to create the easement *de novo*" (q).

[This rule was acted upon in the case of *Worthington v. Gimson* (r), in which *Crompton, J.*, cites the last three paragraphs of the text from the words "where such easements" to "*de novo*," and assents to the statement of the law contained in them; and in *Pearson v. Spencer* (s), *Blackburn, J.*, in delivering the judgment of the court, says, "We do not think that on a severance of two tenements, any right to use ways which, during the unity of ownership, has been used and enjoyed in fact, passes to the owner of the dissevered tenement, unless there be something in the conveyance to show an intention to create a right *de novo*. We agree with what was said in *Worthington v. Gimson* (t), that in this respect there is a distinction between continuous easements, such as drains, &c., and discontinuous easements, such as a right of way."]

What words
sufficient.

General words, such as "appertaining, belonging," &c., have been held in numerous instances, both with regard to rights of common and way, to be insufficient to pass the right upon a severance of the tenements; but a conveyance containing the words "used, occupied, and enjoyed," has been held to be sufficient (u).

(q) Per Bayley, B., in *Barlow v. Rhodes*, 1 C. & M. 448.

(r) 29 L. J., Q. B. 116, 8th Feb. 1860; 2 E. & E. 618.

(s) Q. B. 9 July, 1861, 4 L. T., N. S. 769; 1 B. & S. 571; in error, 3 B. & S. 761.

(t) Ubi sup.

(u) *Bradshaw v. Fyre*, Cro.

Eliz. 570; *Wordledg v. Kingswel*, Id. 794; *Grymes v. Peacock*, 1 Bulstrode, 17; *Saundseys v. Oliff*, Moore, 467; *Staple v. Haydon*, 6 Mod. 1; *Whalley v. Thompson*, 1 Bos. & P. 371; *Conlam v. Slack*, 15 East, 114; *Clements v. Lambert*, 1 Taunt. 205; *Kooystra v. Lucas*, 5 B. & A. 830; *Harding*

Indeed, these words are as much a description of the thing granted, as if the way had been set out by its termini; in either case it would be a matter to be ascertained by parol evidence, what was comprised by the description (*x*).

[In *Wardle v. Brocklehurst* (*y*), the Court of Exchequer Chamber acted upon the cases in which it has been held that these words are sufficient.

Wardle v. Brocklehurst.

In that case, A., owner of two farms, the Lower Beach Farm, situate on a natural stream, and the Red House Farm, not so situate, conveyed the Red House Farm to the defendant, and afterwards conveyed the Lower Beach Farm to the plaintiff.

At the time of the conveyance of the Red House Farm to the defendant, there was an enjoyment and user in fact of water from the stream, by means of an artificial culvert passing from the stream at a point above Lower Beach Farm, through some land not belonging to A., and then through Red House Farm, and from that culvert at the point where it crossed Red House Farm the water was conducted by a pipe to the farm buildings of Red House Farm, while the rest flowed away through the culvert down to the lands of another owner.

The conveyance of Red House Farm to the defendant contained the words "with all waters and

v. Wilson, 2 B. & C. 96; S. C. 3 D. & R. 287; *Barlow v. Rhodes*, 1 C. & M. 439; [*Tutton v. Hammersley*, 3 Ex. 279;] *Plant v. James*, 5 B. & Ad. 791; S. C. 2 Nev. & Man. 517; see also *Phey-*

sey v. Vicary, 16 M. & W. 484.*

(*x*) Phillips and Amos on Evidence, 8th ed. 732; see *Hinchcliffe v. Lord Kinnoul*, 5 Bing. N. C. 25.

(*y*) 1 E. & E. 1058.

* *Baird v. Fortune*, 7 Jur., N. S. 926.

*Wardle v.
Brocklehurst.*

watercourses used, occupied or enjoyed with the premises."

The action was brought by the plaintiff, as owner of the Lower Beach Farm, for the abstraction by the defendant of water from the natural stream by means of the culvert; and it was attempted to distinguish the case from the authorities above referred to, on two grounds; first on the ground that the user and enjoyment, prior to the conveyance to the defendant, being dependent, not merely on the acquiescence of the owner of Lower Beach Farm, but upon the assent of the owner of the land through which the culvert had to pass between the natural stream and Red House Farm, "a thing so subject to capricious interruption could not at law be the subject of a conveyance." Upon this point, *Williams, J.*, in delivering the judgment of the court, said, that if the land between the brook and the Red House Farm had belonged to a third person, the conveyance to the defendant being by the owner both of Lower Beach Farm and of the Red House Farm would amount to a statement by him that, in as far as in him lay, he granted to the defendant the Red House Farm, together with the right to divert the water from the brook, depriving himself of any right to complain thereof in respect of being the proprietor of Lower Beach Farm, and that the effect was the same as a grant by the owner of the Lower Beach Farm of the right to divert the water. To perfect that right, it would be necessary to have a grant from the owner of the land between the brook and the Red House Farm; but it so happened that, in the particular case, the defendant himself was the owner of the intervening land. Therefore (z) the

[(z) See, as to the effect of the subsequent acquisition of title to

right, which existed only as an enjoyment before, was, by the conveyance, clothed with a legal character. The second point of distinction relied upon was that more water was taken from the stream by the culvert than was used for the Red House Farm, and that conveyance only passed so much as was necessary to be enjoyed and used for the Red House Farm (namely, that which passed from the culvert by the pipe to the farm buildings), whereas the defendant, who happened also to be the owner of the lands into which the rest of the water in the culvert passed after it left Red House Farm, was enjoying the water for the use of works upon those other lands also. Upon this the judgment proceeds:—

“ It seems at first a strong thing to say that, by buying the land through which the pipe passed, *i. e.*, the Red House Farm, the defendant can get an enjoyment not only commensurate with the uses of the farm, but sufficient for his other works also. The answer, however, seems to be, that by purchasing the Red House Farm and the enjoyment of the watercourse going through it, he has acquired a right to the watercourse as it existed at the time of the conveyance to him. It is true the enjoyment was only by means of the pipe from the culvert, but he could not have enjoyed that without the existence and continuance of that culvert. The culvert was ancillary to the right. It is plain, as the right conveyed was to have the water enjoyed by the owners of the Red House Farm, and to have it in the way in which they enjoyed it, and as that way was by means of the flow through the culvert, the defendant was

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Brocklehurst.

land, by a person who had made or received a grant of an easement affecting it, the judgment of Lord

Wensleydale in Rowbotham v. Wilson, 8 H. of L. 364.]

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Brooklahurst.

entitled to the continuance of that flow. The consequence is, that after it has passed Red House Farm, the defendant gets a very beneficial enjoyment of it below. But that result does not deprive him of the right to have the flow continued. If he were not entitled to such continuance, he would be obliged to put up some works to provide for the enjoyment of his right to the water. This the plaintiff is not entitled to call upon him to do."]*

* Although the general words in a conveyance "all ways now or heretofore occupied or enjoyed," revive a way over land of the vendor which had formerly existed as an easement, but had become merged by unity of possession, they do not operate as a grant of way over land of the vendee which had been used by him for his own convenience, but had never existed as a right of way, and which convenience ceased to exist on the severance of the tenements. (*Thomson v. Waterlon*, L. R., 6 Eq. 36; *Langley v. Hammond*, L. R., 3 Ex. 161.)

But where a way is in fact used by the grantor's tenant at the time of the conveyance by his license, and is the only access to part of the premises, a right of way over the land so used is granted by the general words, all rights of way occupied or enjoyed or reputed as part thereof or appurtenant thereto, such words being equivalent to all ways now in fact used by the tenant of the land conveyed. (*Kay v. Oxley*, L. R., 10 Q. B. 360.)

And in the case of a continuous easement, like a watercourse made by the vendee for his own convenience, the general words, all watercourses held, used or enjoyed, operate as a grant of an easement to such watercourse. (*Watts v. Kelson*, L. R., 6 Ch. 166.) General words in a lease of 'lights' operate as the grant of the easement to the existing windows over the adjoining land of the lessor, but only for the estate which he then has in such adjoining land. If, at the time of the lease, he holds the adjoining land as lessee, the easement ends with his term; and if he, after the lease, acquires the freehold, he is not, after the expiration of the lease to him of the adjoining land, restrained from building to the obstruction of the lights. (*Booth v. Alcock*, L. R., 8 Ch. 663.) The words in a conveyance as to easements can only be understood as conveying such easements as the vendor has the right to convey. He is not responsible for an act of his before the conveyance, which makes the title of the purchaser no worse than it was

originally. (*Thackeray v. Wood*, 5 B. & S. 325; 6 B. & S. 766; *Blatchford v. Mayor of Plymouth*, 3 Bing. N. C. 691.)

An agreement to grant an easement will not be inferred from a correct plan of the property on a particular of sale. As where a sale plan showed a well on one lot, with an existing pipe from it to a second, the purchaser of the second lot was held not entitled to claim against the vendor the easement of drawing water from the well. No more could be inferred from the plan than from a view of the property. (*Fewster v. Turner*, 11 L. J., Ch. 161; 6 Jur. 144.) A condition in articles of sale that a lot is sold subject to all rights of every nature refers only to rights binding on the vendor, not to easements enjoyed by his tenants by his license. (*Daniel v. Anderson*, 31 L. J., Ch. 610; 8 Jur., N. S. 328; *Russell v. Harford*, L. R., 2 Eq. 507.)

A shop, over which was a leaden roof, was demised to the plaintiff under the description, as the same were late in the occupation of Corke. At that time the tenant of a cottage under the same landlord had granted to him a right to use the leaden roof of the shop. The defendant subsequently took the cottage of the landlord, with a right to use the roof. It was held that he had no right to use the roof as against the defendant. For general words being proper, if not necessary, for the purpose of identification, ought to be attributed to that purpose only. When words in a deed are properly adapted to one purpose, they ought not, unless the effect of them be clear, or the construction of them be affected by the context or the surrounding circumstances, be held applicable to another and different purpose. (*Martyr v. Lawrence*, 2 De G., J. & S. 261; 10 Jur., N. S. 858.)

A building lease described the land demised as bounded by certain newly-made streets, a plan whereof was endorsed, and contained a covenant to kerb the causeways adjoining the land. On the plan were marked certain new streets. It was held that a right of way was granted along the streets referred to in the lease and plan. (*Espley v. Wilkes*, L. R., 7 Ex. 298.) A lease granted a right of way over a roadway or passage lying west of the premises demised. There was a strip of land twenty-three feet wide on the road between the demised premises and other buildings of the lessor, fourteen feet of which lying next the lessee's premises were paved and nine feet unpaved; the plan on the lease did not distinguish between the paved and unpaved. Lord Romilly held that there was a right of way over the whole twenty-three feet. (*Clausens v. Rose*, L. R., 12 Eq. 366.)

CHAPTER IV.

EASEMENTS BY IMPLIED GRANT.

THE implication of the grant of an easement may arise in two ways: 1st, Upon the severance of an heritage by its owner into two or more parts, and, 2ndly, by prescription.

Severance of
tenements.

Upon the severance of an heritage a grant will be implied, 1st, of all those continuous and apparent easements which have in fact been used by the owner during the unity (*a*), [and which are necessary for the use of the tenement conveyed,] though they have had no legal existence as easements: and, 2ndly, of all those easements without which the enjoyment of the severed portions could not be had at all (*b*).

[(*a*) Accidental non-user at the time of the severance, as in the instance of a drain not running by reason of the house not being then occupied, appears immaterial. The real question is whether, at the time of the severance, the structure of the tenement be such that one or more easements are necessary for the enjoyment of it in all its parts: of such easements the grant will be implied; see the judgment, *Hinchcliffe v. Earl of Kinnoul*, 5 Bing. N. C. pp. 22—25. One of the points decided in this case was, in substance, that if a house be demised there is an

implied grant of a way to the coal shoot used for filling the cellar, and opening in the adjacent premises of the reversioner, if such way be found by a jury to be *necessary*. The marginal note of this case omits the finding of the jury, and the case appears in some instances to have been cited as turning on a mere question of conveyancing.]

[(*b*) In the latter class of cases the easement is absolutely necessary, as in the case of a land-locked tenement which can not be got at without a way through the grantor's land. In the former

SECT. 1.—*Disposition of the Owner of Two Tenements.*

The latter class are usually termed easements of necessity; the former mode of acquiring a right it is proposed to call—Disposition of the owner of two tenements,—which phrase is adopted as expressing the same origin of title as that which is designated by the French law “*Destination du père de famille*,” with the incidents to which, as defined by the Code Civil, the English law upon this subject appears to agree.

“ By the ‘*destination du père de famille*’ is understood the disposition or arrangement which the proprietor of several heritages (*fonds*) has made for their respective use. Sometimes one heritage receives a benefit from another, without being in return subjected to an inconvenience which could amount to a species of compensation; sometimes this service is reciprocal: but these differences do not in any way change the nature or effect of this distribution. If afterwards these heritages should become the property of different owners, whether by alienation or division amongst his heirs, the service which the one derived from the other, which was simple ‘*destination du père de famille*,’ as long as the heritages belonged to the same owner, becomes a servitude as soon as they pass into the hands of the different proprietors”(c).

Cases of this nature, which have come under the consideration of our courts, have generally been treated as arising from the application of the rule, that “no man

class the easement is necessary for the use of the tenement in the state it is in when severed, although not absolutely necessary, as in *Pyer v. Carter*, post, p. 101, where

the grantee could have made a new drain through his own land.]

(c) Pardessus, *Traité des Servitudes*, s. 228.

Destination du
père de famille.

can derogate from his own grant." This maxim, however, although consistent with the doctrine stated, is insufficient to account for the principle, that the obligation is imposed equally on the grantee and the grantor.

There may be instances in which easements would arise, on the severance of tenements, from the operation of the former principle only—where, however, there is no "apparent sign of servitude;" but, unless the easement be presumed, the grantor would in fact derogate from his own grant.

Disposition of
owner of two
tenements.

[51]

An easement is a quality superadded to the usual rights, and as it were passing the ordinary bounds of property; and with the exception of those easements, the enjoyment of which depends upon an actual interference of man at each time of enjoyment, as of a right of way, it is attended with a permanent alteration of the two heritages affected by it, showing that one is benefited and the other burdened by the easement in question. This permanent quality affecting the two heritages is sometimes affixed by nature itself, as in the case of water, "which holds its natural course," and, as it is observed by *Brudenell* in 12 II. 8, "*naturâ suâ descendit (d)*"; sometimes it is artificially affixed, as by the erection of a roof or the placing of a gutter throwing the rain water on the neighbour's land.

To clothe with right this permanent alteration of the qualities of two heritages, the consent of the owner of the servient tenement, in the manner appointed by law, is necessary; but where the land benefited and the land burdened belong to the same owner, he may change the qualities of its several parts at his will, and his express volition evidenced by his acts must at least be

(d) *Sury v. Piggot*, Popham, 169, per Whitlocke, C. J.

as effectual to impress a new quality upon his inheritance as the implied consent arising from his long-continued acquiescence.

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owner of two
tenements.

The only opposition to the current of authority, that this disposition is binding equally on the grantor and grantee, and the parties claiming under them respectively, is a dictum of Lord *Holt*, in the case of *Tenant v. Goldwin* (*e*), as reported by Lord Raymond: "As to the case of *Palmer and Fletcher*," said Lord *Holt*, "if indeed the builder of the house sells the *house*, with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house; and as *he* cannot do it, so neither can his vendee. But if he had sold the vacant piece of ground and kept the house, without reserving the benefit of the lights, the vendee might build against his house (*f*). But, in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights." The report of the same case by Salkeld (*g*), who was himself counsel in the cause, is silent as to any such dictum; and from the report in 6 Mod. 314, it would seem that the court only expressed a doubt on the point. "If he had sold the vacant ground without reserving the benefit of the lights, the court doubted in that case that the vendee might build so as to stop the lights of the vendor, because he had parted with the ground without reserving the benefit of the lights; for that case differs from that of *Palmer v. Fletcher*." This opinion of Lord *Holt*, if indeed it can be treated

[52]

(*e*) 2 Lord Raym. 1093.

[(*f*) See 9 Exch. p. 220, where *Parke*, B., expressed his opinion that the priority in order of conveyance makes no difference, and

that the vendee would have no right to stop the lights; and see post, p. 102.]

(*g*) Vol. i. 360.

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as such, was probably founded on the civil law, whereas the doctrine of the English law was apparently of French origin. The Code Civil in this respect merely recognized an ancient provision of the French law (*h*).

The doctrine, that both parties are equally bound to respect the disposition of the property, derives additional weight from its coincidence with the analogous case of easements commonly called of necessity, which, it is quite clear, are equally implied in favour of both parties.

It is true, that, strictly speaking, a man cannot subject one part of his property to another by an easement, for no man can have an easement in his own property, but he obtains the same object by the exercise of another right, the general right of property; but he has not the less thereby permanently altered the quality of the two parts of his heritage; and if, after the annexation of peculiar qualities, he alien one part of his heritage, it seems but reasonable, if the alterations thus made are palpable and manifest, and in their nature permanent changes in the disposition of the property, so that one part thereby becomes dependent upon another, that a purchaser should take the land burdened or benefited, as the case may be, by the qualities which the previous owner had undoubtedly the right to attach to it.

This reasoning applies to those easements only which are attended by some alteration which is in its nature obvious and permanent; or, in technical language, to those easements only which are apparent and continuous; understanding by apparent signs not only those which must necessarily be seen, but those which

(*h*) Pothier, *Coutume d'Orléans*. Introduction au titre XIII.

may be seen or known on a careful inspection by a person ordinarily conversant with the subject.

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[This was the view taken by the Court of Exchequer in *Pyer v. Carter* (i), where the observation in the text is cited and approved by the court. In that case the defendant's house adjoined the plaintiff's, and the action was for stopping a drain running under both houses. The two houses had formerly been one, and were converted into two by a former owner, who conveyed one to the defendant and afterwards the other to the plaintiff. At the time of the conveyances the drain existed, running under the plaintiff's house and then under the defendant's, and discharging itself into the common sewer; water from the eaves of the defendant's house fell on the plaintiff's, and then ran into the drain on the plaintiff's premises and thence through the defendant's premises into the common sewer. The plaintiff's house was drained through the same drain. It was proved that the plaintiff might have made a drain direct from his house into the common sewer, and it was not proved that the defendant when he purchased knew of the position of the drain.

Pyer v.
Carter.

It was laid down by the court that, where the owner of two or more adjoining houses conveys one to a purchaser, such purchaser will be entitled to the benefit of all drains from that house, and subject to all the drains then "necessarily used" for the enjoyment of the adjoining house, and that without any express reservation or grant, inasmuch as the purchaser takes the house "as it is;" and that the question as to what is "necessarily used" depends upon *the state of things at the time of the conveyance, and as matters then stood without alte-*

(i) 1 H. & N. 922.

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*Pyer v.
Carter.*

ration; and upon the argument urged that this was not an "APPARENT" and continuous easement, the court said that, although the defendant did not know of the existence of the drain at the time of the conveyance to him, yet as he must or ought to have known that there was some drainage for the waters, he ought to have inquired, and the court "agreed with" the author's observation, that those things are apparent which would be so, upon a careful inspection by a person conversant with such matters.

In the case above cited the defendant purchased before the plaintiff, but it appears from the judgment of the court in the case itself, and also from the principle to be gathered from *Richards v. Rose* (*k*), and *Pinnington v. Galland* (*l*), cited post, that the priority of the conveyances in order of time in such a case would be quite immaterial; and in the case of *Ewart v. Cochrane* (*m*), in the House of Lords, Lord Campbell assented to the decision in *Pyer v. Carter*, adding, "that it would apply to any drain or any other easement necessary for the enjoyment of the property" (*n*).*]

(*k*) 9 Exch. 218.

(*l*) 9 Exch. 1.

(*m*) 7 Jur., N. S. 925; 4 Macq. S. A. 117.

[(*n*) In the case of *Pyer v. Carter*, the conveyance to the defendant was first in point of time, and the court distinctly recognized the doctrine that both grantor and grantee are equally bound, as in the case of easements strictly of necessity. In *Worthington v.*

Gimson, 29 L. J., Q. B. 116; 2 E. & E. 618, already referred to, p. 90, it was attempted, without success, to extend the rule to an ordinary way. In that case, and in *Pearson v. Spencer*, 1 B. & S. 571, referred to p. 90, the distinction between continuous and permanent easements, such as drains, and ordinary ways, pointed out by the author in his 2nd edit., was recognized by the court. It is

* *Ewart v. Cochrane* differs from *Pyer v. Carter*. In the one case an easement of a convenient drain over the land of the grantor was im-

There is no reason why a purchaser should not exercise the same degree of caution in ascertaining what

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obvious that the case of lights falls within the "continuous" and permanent class, and, therefore, that if a house-owner sells a piece of land adjoining his house, the buyer cannot build up against his windows. It may be difficult sometimes to say under which of the two classes a given case falls; but

it is clear that there are *some* rights of way which would fall within the class of which *Pyer v. Carter* is one, until the judgment of the court in *Hinchcliffe v. Earl of Kinnoul* is expressly overruled; see post, p. 124, upon the state of the authorities and the result of them.]

plied in favour of the grantee; in the other, a like easement was implied over the land of the grantee in favour of the grantor.

In *Exart v. Cochrane*, the respondent claimed the right to send the refuse of his tan-yard through a drain into a cesspool in the appellant's garden. Both tenements had belonged to Massey, who had sold the tan-yard to the respondent's predecessor, without allusion in the conveyance to the drain; he afterwards sold the garden to the appellant, who stopped the drain. The decision was in favour of the respondent, on the ground that where two properties are possessed by the same owner, and there has been a severance made of part, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant if there be the usual words of conveyance. "I do not know whether the usual words are essentially necessary, but when there are the usual words I cannot doubt that such is the law" (per Lord Campbell, C.); and (per Lord Chelmsford), "The right of the pursuers must arise from an implied grant, which implication of grant must result from the evidence in the case that the use and enjoyment is necessary to the enjoyment of the tan-yard."

Exart v.
Cochrane.

To the same effect is *Hall v. Lund* (1 H. & C. 676). The owner of two mills leased one to the defendant. In the lease he was described as a bleacher, and the mill as lately occupied by Pullan, who had formerly carried on the business of bleacher in the mill leased, and drained his refuse into a watercourse which supplied the other mill. The lessor afterwards sold the mills to the plaintiff, who sued the defendant for polluting the watercourse with the drainage from his bleaching works, to the injury of the other mill. The action failed because the lessor, with full knowledge of the mode in which the premises had been used by the former lessee, granted the defendant a new lease of the premises for the same purpose. And, per *Martin, B.*, "Where there is a demise of premises with which certain rights have been usually enjoyed, it must

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easements his projected purchase is liable to in favour of his vendor, as well as in favour of other adjoining owners (*o*).

(*o*). Vide ante, 25, Apparent and non-apparent easements.

be taken that the lessor has granted those rights." *Channell*, B., said, that *Pyer v. Carter* was confirmed, and its principle explained, in *Ewart v. Cochran*. *Wilde*, B., "I by no means mean to say that in every case of a new division the premises may be used with all the liberties and privileges enjoyed by the former lessee. It seems to me, that in cases of implied grant the implication must be confined to a reasonable use of the premises for the purpose for which, according to the obvious intention of the parties, they are demised."

And see *Herz v. Union Bank* (2 Giff. 686), where on the demise of a dwelling-house, in which the lessee was described as a jeweller, a grant of an easement of sufficient light for the business of a jeweller was implied.

White v. Bass.

White v. Bass (7 H. & N. 722) decides that on a general conveyance of land there is no implied grant by the purchaser of the easement of light necessary for the enjoyment of an adjacent house of the vendor. *Channell*, B., adopts the dictum of Lord *Holt* in *Tenant v. Goldwin* (2 Ld. Raym. 1093), that if the owner of a house and vacant piece of ground sells the vacant piece of ground without reserving the benefit of the lights, the vendee may build against his house. *Pyer v. Carter* was cited for the plaintiff, but was held inapplicable. (See also *Carriers Company v. Corbett*, 11 Jur., N. S. 719; 2 Drew. & Sm. 35.)

Dodd v. Burchell.

Dodd v. Burchell (1 H. & C. 113). The parties claimed under the same person. By the side of the plaintiff's house was a passage leading to the defendant's. In the plaintiff's house was a side door opening into the passage: a door from his garden also opened into the passage. The common owner having first conveyed part of the passage to the defendant, extending beyond the garden door, it was held that no right of way from the garden door, or between the house and garden door, could be implied. *Martin*, B., there says. "*Pyer v. Carter* went to the very extent of the law, but if considered cannot be complained of; for if a man has two fields drained by an artificial ditch cut through both, and he grants to another person one of the fields, neither he nor the grantee can stop up the drain, for there would be the same right of drainage as before, for the land was sold with the drain in it."

In *Pearson v. Spencer*, in the Exchequer Chamber (3 B. & S. 762), *Pyer v. Carter* was cited and discussed by the judges. *Martin*, B., says, "I thought that a strange decision, but it has recently been confirmed by the House of Lords." For other judicial remarks on *Pyer v. Carter*, see *Folden v. Bastard* (4 B. & S. 263; L. R., 1 Q. B. 160).

The "destination du père de famille" confers a title (vaut titre) to servitudes which are apparent and con-

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Suffield v. Brown (9 Jur., N. S. 999). The plaintiff, the owner of a dock, claimed an easement over the defendant's wharf for the bowsprits of vessels in his dock to project over it. Within twenty years the dock and wharf belonged to the same person. The wharf was sold and conveyed absolutely to the purchaser, but the dock was then and had for many years before been used for repairing ships, and their bowsprits projected over the wharf. The Master of the Rolls (Lord Romilly) held the plaintiff entitled to the easement claimed, on the ground that it was necessary for the full enjoyment of the dock as it stood at the time of the purchase of the wharf, relying on the cases of *Hinchcliffe v. Earl of Kinnoul* and *Pyer v. Carter*. His decision was reversed by the Chancellor, Lord Westbury (4 De G., J. & S. 185; 10 Jur., N. S. 111; 33 L. J., Ch. 249). He said that "it seemed to be more reasonable and just to hold, that if the grantor intended to reserve any right over the property granted it was his duty expressly to reserve it in the grant rather than to cut down and limit the operation of a plain grant by the fiction of an implied reservation. The comparison of the disposition of the owner of two tenements to the destination du père de famille was a mere fanciful analogy, from which rules of law ought not to be derived. He dissented from *Pyer v. Carter*. The expression there used, that the purchaser took the house such as it was, was erroneous: he took it not such as it was, but such as it was described and sold and conveyed to him by his deed of conveyance. The decision in *Nicholas v. Chamberlain* (Cro. Jac. 121) was on an express reservation. The owner of the house and land, by reserving the house on the sale of the land, reserved the conduit as part of the house. To that case, The Year Book, 11 Hen. 7, and *Sury v. Piggot*, Palm. 444, there was no objection, but they did not support the decision in *Pyer v. Carter*. *Hinchcliffe v. Earl of Kinnoul* did not apply to the question of an easement reserved by implication on the grant of a quasi servient tenement. It rested on the ordinary principle of law, that if I grant a tenement for valuable consideration I also grant a right of way through my land, if such way be absolutely necessary for the enjoyment of the thing granted. There might be two tenements, as, for example, two houses so constructed as to be mutually subservient to and dependent upon each other, neither being capable of standing or being enjoyed without the support it derives from its neighbour. In which case the alienation of one house by the owner of both would not estop him from claiming, in respect of the house he retains, the support from the house sold, which was at the same time afforded by the former to the latter tenement, which was the case of *Richards v. Rose* (9 Ex. 218); but

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tinuous (*p*). If the proprietor of two heritages, between which there exists an apparent sign (*signe apparent*) of

(*p*) Code Civil, art. 692.

where the right claimed in respect of the tenement retained by the joint owner against the tenement granted by him is separable from the former, it was severed, and either passed or extinguished by the grant." (See also *Fewster v. Turner*, 11 L. J., Ch. 161; 6 Jur. 144; *Russell v. Harford*, L. R., 2 Eq. 507; *Morland v. Cook*, L. R., 6 Eq. 265.)

Richards v. Rose is not an authority for an implied reservation or grant by the purchaser of a right of support on a conveyance of a house in fee. The right there was claimed by one leaseholder against another, both claiming under the same freeholder, and in the case of a lease the lessee has, generally speaking, no right to alter the tenement leased. *Riviere v. Bowyer* (1 Ry. & Mood. 24) is open to a similar observation. It may be doubted whether in a conveyance in fee simple any reservation of an easement can be implied for the benefit of other property of the grantor. The maxim that a man shall not derogate from his own grant, from which is implied the grant of an easement necessary or useful for the enjoyment of the property granted, does not favour the implication of a grant by the grantee of an easement over the land granted.

On the same principle, on a conveyance of riparian land the grantee is entitled as against the grantor to a flow of pure water along the stream appurtenant to the land granted; and the grantor cannot, without an express grant, justify fouling the water, although he may have done so from the drainage of a manufactory existing before and at the time of the grant. (*Crossley v. Lightowler*, L. R., 3 Eq. 279; 2 Ch. Ap. 478).

*Watts v.
Kelson.*

Watts v. Kelson (L. R., 6 Ch. 166). The owner of two closes having made an artificial watercourse for the supply of cattle-sheds, first conveyed the cattle-sheds to the plaintiff, and afterwards the close through which the watercourse ran to the defendant. The Lords Justices, after citing the judgment of the Exchequer Chamber in *Polden v. Bastard* (L. R., 1 Q. B. 161), say: "There is a distinction between easements, such as a right of way, or easements used from time to time, and easements of necessity, or continuous easements. The cases recognize this distinction, and it is clear law that upon a severance of tenements easements as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time, they do not pass, unless the owner by appropriate language shows an intention that they should pass." They were clearly of opinion that the easement in the case before them was in its nature continuous. "There was an actual construction on the servient tenement extending to the dominant tenement, by which water was con-

servitude, disposes of one of the heritages without any stipulation (convention) being contained in the contract respecting the servitude, it continues to exist actively or passively in favour of the heritage alienated or upon it (q).

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“It is obvious,” says Pardessus, “that this disposition (état des lieux), which, from a simple destination du père de famille, thus changes itself into a servitude, must not be a momentary change for the sake of some temporary convenience; it is scarcely possible to suppose, in the absence of express agreement, that a party would have desired to preserve a right which served only for purposes purely personal, or mere pleasure. The parties are presumed to have been desirous of preserving those servitudes only which are evidently necessary” (r).

Must be apparent and continuous.

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In the case of *Pheysey v. Vicary* (s) there were two

Pheysey v. Vicary.

(q) Code Civil, art. 694; Merlin, ubi supra.

(r) Pardessus, ubi supra.

(s) 16 M. & W. 484.

tinnously brought through the servient to the dominant tenement for the use of the occupier of the dominant tenement. According to the rule as laid down by Chief Justice *Erle*, the right to such an easement as the one in question would pass without any words of grant, and we think that this is the correct rule.” The easement was claimed through the land of the grantor. The case, therefore, is the same as *Erart v. Cochrane*. In the course of the argument, *Mellish*, L. J., said: “I think that the order of the conveyance in point of date is immaterial, and that *Pyer v. Carter* is good sense and good law. Most of the common law judges have not approved of Lord *Westbury*’s observations on it.” *James*, L. J., “I, also, am satisfied with the decision in *Pyer v. Carter*.”

Robinson v. Grave, 21 W. R. 223; 27 L. T., N. S. 648; 8 W. N. 83. Mrs. Turner agreed to sell a piece of land to Kembley for the purpose of his building a house; he afterwards built it. The defendant, who claimed the adjoining land from Mrs. Turner by subsequent conveyance, was restrained from building to the obstruction of his windows.

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houses, contiguous to the highway, of which there had been unity of ownership. By will, the owner of both devised one to the plaintiff and one to the defendant. During the unity, and at the time of the severance, there was a horse carriage-drive used in common, in front of, and for the convenience of, both houses. It was contended, that on the severance a right existed to continue to have the way which had been used during the ownership. The court however refused to treat this way as a "permanent" alteration of the disposition of the premises. There was, it is true, a visible sign of the former use of a way, but the "signe apparent" of the necessary and permanent dependance of one house on the other for its enjoyment was wanting (*t*).

[In *Pyer v. Carter*, already cited, the necessary dependence of the one house on the other, and the existence of the sign of it, the drain, was pointed out and relied upon by the court. See the observations as to *Pheysey v. Vicary*, post.]

The cases in which it has been held that easements of this nature are not extinguished by unity of ownership, unless the party has availed himself of his rights of property to destroy the external mark of the easement, as by cutting a spout, or removing the eaves of a house, are authorities in support of this doctrine.

The easement as such can in no case exist during the unity of ownership; and if the owner might at any moment determine the easement by altering the relative disposition of the parts of his tenement *inter se*, what difference can it make whether he has suffered things to

[*(t)* So if the sign be visible, but indistinct and uncertain in its character and object. Per *Bram-*

well, B., in *Glaze v. Harding*, 27 L. J., Exch. 286.]

continue as they were previous to the union, or whether he has made one portion of his estate subject to the convenience of another by some express act done during the union?—in either case he has acted by virtue of his general rights of property.

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owner of two
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Unless it can be said that it makes a difference, that in the one case previous to the union a valid easement had been constituted, it is difficult to see on what ground any distinction can be contended for between the cases; but in a case on the subject, the authority of which has been frequently recognized, it is clear that no such right existed before the union, and that what was in fact a wrongful act, a nuisance, before the union, ceased to be so and was clothed with a legal title upon a subsequent separation (*s*). The earliest case directly in point upon this subject, and one which is repeatedly cited, and upon which great reliance is placed in subsequent cases, was decided in the 11 H. 7; and although an attempt was made in argument in some of the later cases to distinguish it as a case of custom, the authority attached to it by the judges shows that they did not consider its applicability as at all restricted on that ground:—

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One *William Coppy* brought an action on the case against *J. de B.*, and counted that according to the custom of London, where there were two tenements adjoining, and one had a gutter running over the tenement of the other, the other cannot stop it, though it be on his own land; and counted how he had a tenement and the defendant another tenement adjoining. The defendant's counsel said, "We say that since the time of memory one *A.* was seised of both tenements, and enfeofed the plaintiff of the one and defendant of the other." To

Coppy v. J. de B., 11 H. 7.

(*s*) *Robins v. Barncs*, Hobart, 131; post, 113.

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owner of two
tenements.

*Chippy v. J. de
B.*, 11 H. 7.

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which it was replied, "This is not a good plea, for the defendant seeks to defeat the custom by reason of an unity of possession since the time of memory; and that he cannot do in this case, for such a custom, that one shall have a gutter running in another man's land is a custom solemnly binding the land, and this is not extinct by unity of possession; as if the lord of a seignior purchase lands held in gavelkind, the custom is not thereby extinguished, but both his sons shall inherit the lands, for the custom solemnly bindeth the lands." *Townshend* said, "If a man purchase land of which he hath the rent, the rent is gone by the unity of possession, because a man cannot have a rent from himself; but if a man hath a tenement from which a gutter runneth into the tenement of another, even though he purchase the other tenement, the gutter remains, and is as necessary as it was before." To this it was objected by the defendant's counsel, "That he who was the owner of the two tenements might have destroyed the gutter; and that if he had done so, and then made several feoffments of the two tenements, the gutter could not have revived." To which it was replied, "If that were so, you might have pleaded such destruction specially, and it would have raised a good issue." 11 H. 7, 25, pl. 6.*

Case of warren.

The case of warren, relied upon as illustrating the argument of the existence of an easement notwithstanding the unity, is as follows, 35 Hen. 6, 55, pl. 1:—

An action of trespass was brought for hunting in the plaintiff's warren and carrying away his hares and rabbits. The defendant pleaded in abatement, that the

* This was the case of a custom which is a local law, does not originate in a presumed grant, and is not affected by unity of possession. (*Gateward's case*, 6 Rep. 60 b; *Drake v. Wigglesworth*, Willes, 658.)

place where, &c. was the manor of D., in which manor the plaintiff had nothing, except as joint tenant with two others. On demurrer, judgment of respondeat ouster was given. The objection to the plea was, that although the plaintiff was but a joint tenant of the land, he might still be sole owner of the warren; and that, as it did not appear by the plea whether he was so or not, and a plea in abatement to be good must be "bon a cescun comon entent," the plea was bad. A man, it is there said, may have warren either by grant of the king in his own land, or by prescription in the lands of another. Common and rent are not like a warren, for if one has a certain rent issuing out of land, and he purchase the land the rent is gone; and the same law of a common, for a man cannot pay rent to himself or have common on his own land; but one may have warren either in the land of another man or his own, for it is not issuing out of the land, neither is it payable; but it is, as has been said, realty and privilege in the land, and nothing else. [A free warren, being a franchise, which (like that of forest, chase and the like) subsists as a distinct and separate inheritance at the same time with the ownership of the land over which it extends in those cases where it happens to belong to the owner of that land, does not furnish any analogy.]

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Positive easements, authorizing acts on the land of another, which the ordinary right of property enables a man to do on his own land, necessarily merge when the land upon which they are exercisable becomes vested in their owner; but the franchise of free warren confers privileges, the right to which could not be claimed on a man's land by virtue of his ownership of the land, and which are wholly unconnected with that ownership.]

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owner of two
tenements.

Nicholas v.
Chamberlain.
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In *Nicholas v. Chamberlain* (t), which was an action of trespass, “it was held by all the court upon demurrer that if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house; because it is necessary and quasi appendant thereunto; and he shall have liberty by law to dig in the land for amending the pipes or making them new as the case requires. So it is if lessee for years of a house and land erect a conduit upon the land, and after the term determines the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one and the land to another, the vendee shall have the conduit and the pipes and liberty to amend them. But, by *Popham*, if the lessee erects such a conduit, and afterwards the lessor, during the lease, sells the house to one, and the land, wherein the conduit is, to another, after the lease determines he who hath the land wherein the conduit is may disturb the other in the using thereof, and may break it, because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation or usage of them together by him who had the inheritance. So it is if a disseisor of a house and land erects such a conduit, and the disseisee re-enter, not taking conusance of any such erection nor using it, but presently after his re-entry sells the house to one and the land to another, he who hath the land is not compellable to suffer the other to enjoy the conduit; but in the principal case,

(t) Cro. Jac. 121.

by reason of the misleading therein, there was not any judgment given.”

The case of *Robins v. Barnes* (u) is thus reported in Rolle:—“If A. is seized in fee of a house which hath certain windows by prescription, and B. hath another house close adjoining to that, and B. *tortiously* erects a structure on his own frank tenement, which overhangs the house of A. and thereby stops his light, and afterwards B. purchase in fee the house of A., and afterwards grant by lease to C. the house which was the house of A., C. has no remedy to abate this nuisance; for by the unity of possession the prescription for the windows was extinct; being that C. ought to take that in such plight as it was at the time of the grant made to him, *for the unity purges the tort*, both being in the hand of one person, who might deal with it at his pleasure.”

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owner of two
tenements.

Robins v.
Barnes.
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“So it is if B. afterwards pull down his house and rebuild it in the same manner as it was before, so that he does not make it overhang more than it did at the time of the grant to C.; but if he causes it to overhang more than before, an action lies for C. to have this remedied, for it is a new tort.”

In the report in Hobart the court agreed: “That though one of the houses had been built overhanging the other wrongfully before they came into one hand, yet after, when they came both into the hand of Allen, that wrong was now purged, so that *if the houses came afterwards into several hands, yet neither party could complain of a wrong before.*” It is to be observed, that in this case the action was brought not only for disturbing the easement of ancient light, but also for an

(u) Roll. Abr. tit. Extinguishment, D. 936, pl. 7; S. C. Hobart, 131; Vin. Abr. Extinguishment, D. pl. 7.

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tenements.

*Robins v.
Barnes.*

infringement of the common law rights of property, by making a roof overhanging the plaintiff's soil; and the decision is not only an authority for the position, that the abstinence of the owner of the united tenements from removing the obstruction to the windows was an extinguishment to the prescriptive right to the light, but also that by his permitting the overhanging roof to continue, and severing the tenements in that condition, the encroachment of the overhanging roof, though tortious at the time the tenements first became his property, was legalized.

*Sury v.
Pigott.*

In *Sury v. Pigott* (x), an action was brought for obstructing a stream of water running over the defendant's land to a pool of the plaintiff's, situate in a close which was part of the plaintiff's rectory. The defendant pleaded that the land over which the water ran, and the plaintiff's close, were both part and parcel of the manor of Markham, and that King Henry VIII., being seised of the said manor in his demesne as of fee, granted the land over which the water ran to one under whom the defendant claimed; and the question was, whether the unity of ownership in the king had extinguished the easement.

For the plaintiff it was argued, that the easement was not extinct, because it was a thing of necessity, and though a rent and a way may be extinguished by unity, the easement had a separate and distinct existence; and it was likened to the case of warren, or a right to drive beasts to pasture in a forest, which rights are not extinguished by unity. So also of a gutter, which, like a watercourse, has a separate existence.

(x) Palmer, 444; S. C. Popham, 166; 3 Bulstrode, 339; Noy, 84; Latch, 153; W. Jones, 145.

On the other side it was argued, that it was extinct by unity, because it was a charge on the soil of another, as a right of way or enclosure, both of which have been held to be extinguished by unity; and although the custom of gavelkind is not extinguished by purchase of the seignior, yet it is otherwise of a prescription, which follows the estate in the land and the person.

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owner of two
tenements.

*Sury v.
Pigott.*

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It was resolved by the whole court that the watercourse was not extinguished, but *Dodderidge, J.*, said, "That a way, if it were of convenience (*voy de case*) is extinguished, but not a way of necessity." And so it was the opinion of *Topham, C. J.*, in the *Lady Brown's* case: "If a man hath a stream of water which runneth in a leaden pipe, and he buys the land where the pipe is, and cuts the pipe and destroys it, the watercourse is extinct, because he thereby declares his intention and purpose that he does not wish to enjoy them together, viz. the watercourse and the land." *Dodderidge, J.*, argued that a fence should be extinguished by unity, because it is not of necessity, and put this case: "A man having a mill and a watercourse over his land, sells a portion of the land over which the watercourse runs; in such a case by necessity the watercourse remaineth to the vendor, and the vendee cannot stop it." *Whitlocke, C. J. (y)*, said, "A way or common shall be extinguished, because they are part of the profits of the land, and the same law is of fishings also; but in our case the watercourse doth not begin by consent of parties nor by prescription, but *ex jure naturæ*, and therefore shall not be extinguished by unity. A warren is not extinguished by unity, because a man may have a warren in his own land; and in the case 11 H. 7, the

(y) *Popham*, 170.

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owner of two
tenements.

*Sury v.
Pigott.*

*Cox v.
Matthews.*

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*Palmer v.
Fletcher.*

gutter was not extinguished only by the unity of possession; but there also appeareth in the case that the pipes were destroyed, whereby it could not be revived."

In *Cox v. Matthews* (z), which was an action for stopping lights, an exception was taken to the declaration, because it did not state the plaintiff's house to be ancient. *Hale* said, "That if a man builds a house
" upon his own ground, he that hath the contiguous
" ground may build upon it also, though he doth
" thereby stop the lights of the other house; for *cujus*
" *est solum ejus est usque ad cælum*, and this holds
" unless there be a custom to the contrary, as in
" London. But in an action for stopping of his light,
" a man need not declare of an ancient house; for if a
" man should build an house on his own ground, and
" then grant the house to A., and grant certain land
" adjoining to B., B. could not build to the stopping of
" its lights in that case."

In *Palmer v. Fletcher* (a), which was an action on the case for stopping lights, it appeared that a man erected a house on his own land, and afterwards sold the house to one and the land adjoining to another, who obstructed the lights of the house: and it was resolved, "that though it was a new passage, yet no person who claimed the land by purchase. under the builder, could obstruct the lights any more than the builder himself could, who could not derogate from his own grant, for the windows were a necessary and essential part of the

(z) 1 Ventris, 237, 239; S. C. 167, 227, nom. *Palmer v. Flessiers*;
3 Keble, 133, as to a point of 1 Keble, 553, 625, 794, nom.
pleading only. *Palmer v. Flessier*.

(a) 1 Levinz, 122; 1 Siderfin,

house." *Kelynge*, J., said, suppose the land had been sold first, and the house after, the vendee of the land might stop the lights. *Twysden*, J., to the contrary, said, whether the land be sold first or afterwards, the vendee of the land cannot stop the lights of the house in the hands of the vendor or his assignees, and cited a case to be so adjudged; but all agreed that a stranger, having lands adjoining to a messuage, newly erected, may stop the lights, for the building of any man on his lands cannot hinder his neighbour from doing what he will with his own lands; otherwise, if the messuage be ancient, so that he has gained a right to the lights by prescription. And, afterwards, a like judgment was given between the same parties, for erecting a building on another part of the lands purchased, whereby the lights of another new messuage were obstructed.

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owner of two
tenements.

*Palmer v.
Fletcher.*

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In *Peyton v. Mayor of London* (b), which was an action for withdrawing support by pulling down an adjoining house, the declaration contained no allegation of any right to support, or of any fact from which that right might be inferred in law; it, therefore, was unnecessary to decide what the result would have been had the two houses originally belonged to the same owner. Lord *Tenterden*, in delivering judgment, alludes to such a state of facts, apparently inclining to favour the existence of such a right, if there had been at some former time a unity of the ownership of the two houses. [And the judgment of the Court of Exchequer in *Richards v. Rose* (c) is an authority to show, that upon the severance of ownership of two or more houses, obviously and necessarily requiring

*Peyton v.
Mayor of
London.*

(b) 9 B. & C. 736.

Murchie v. Black, 19 C. B., N. S.

(c) 9 Exch. 220. See also 190.

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owner of two
tenements.

*Peyton v.
Mayor of
London.*

mutual support, there is, by an implied grant or reservation, as the case may be, the right to support; and that such "right equally subsists, whether the owner parts first with one and then with the other or with two together, the last being afterwards divided." This case was treated by the court as one of absolute necessity.]

*Canham v.
Fiske.*

In *Canham v. Fiske* (d), the plaintiff purchased a garden, through which ran a stream of water, from a person who was also the owner of an adjoining field, in which the spring supplying the stream took its rise; the defendant, having bought the field, diverted the stream, after the plaintiff had used the water for about nineteen years. At the trial, the learned judge was of opinion, that as, at the time of the plaintiff's purchase, the two closes were the property of the same owner, the unity of ownership destroyed the prescriptive right, and consequently nonsuited the plaintiff. The Court of Exchequer granted a new trial. Lord *Lyndhurst* observed,

63] "The plaintiff bought the land with the water upon it; and if the conveyance were silent as to the water, still the water would pass by the grant of the land. If the conveyance had been produced, and had been silent as to the water, still the conveyance would have passed the water which flowed over the land. Are we to assume that the water was excepted out of the conveyance merely because the conveyance was not produced?" And *Bayley*, B., added, "If I build a house, and, having land surrounding it, sell the house, I cannot afterwards stop the lights of that house. By selling the house I sell the easement. The land is purchased with

the water running upon it, and the conveyance passes the land with the easements existing at the time" (e).

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tenements.

In *Swansborough v. Coventry* (f), the plaintiff and defendant purchased adjoining ancient houses from the same vendors, that of the defendant obstructing the ancient windows of the plaintiff's house on the ground floor; the defendant, having pulled down this building, erected a new one, so as to obstruct other windows in the plaintiff's house, and for this obstruction the action was brought. The decision of the case did not turn upon the fact, that both houses were ancient, but upon the established rule, that "no man shall derogate from his own grant." "It is well established by the decided cases," says *Tindal*, C. J., "that where the same person possesses a house having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new he cannot, nor can any one who claims under him, build upon the adjoining land, so as to obstruct or interrupt the enjoyment of those lights." "The sales to the plaintiff and defendant being sales by the same vendor, and taking place at one and the same time, we think the rights of the parties are brought within the application of the general rule of law."

Swansborough
v. Coventry.

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In *Riviere v. Bower* (g), the plaintiff was proprietor of a house, which he had divided into two tenements, one of which he demised to the defendant, retaining the other in his own occupation; the defendant obstructed a window which the plaintiff had made in his own house

[(e) The right in this case appears to have been an ordinary right of property, and not an easement.]

(f) 9 Bing. 305; S. C. 2 M. & Scott, 362.

(g) Ry. & Moo. 24.

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shortly before the demise to the defendant. On the part of the defendant it was objected, that the action did not lie unless the window was ancient. Lord *Tenterden* held, " That the action was maintainable against a possessor holding as tenant for an obstruction to a window existing in the landlord's house at the time of the demise, although of recent construction, and that although there was no stipulation at the time of the demise against the obstruction."

*Coutts v.
Gorham.*

[65]

In *Coutts v. Gorham* (*h*), which was an action for obstructing lights, it appeared that one Hall was the owner of two adjoining houses, each of which had certain ancient windows. In 1800, he made a lease of one of these houses for 21 years, determinable on lives, of which lease the defendant was assignee; and in November, 1809, the defendant took a new lease of the same house for 21 years. The windows of the other house had been altered, and placed in a different situation at a period (as it appeared) within 20 years before the obstruction complained of; but the jury found the alteration to have taken place previous to the lease to the plaintiff in May, 1809. *Tindal*, C. J., said, " If the windows were in existence at the time of the lease to the plaintiff, he is entitled to recover. Hall, who executed the lease when the windows were there, could not himself obstruct them afterwards; and if so, he could not convey to any other possessor a right to do so."—" It is true that the defendant had an existing term at the time, and his interest in that term would not be affected by Hall's lease; but he surrendered that term by operation of law, when he accepted a new lease from Hall."—" The defendant's new lease was derived

out of Hall's reversion, and Hall's reversion was subject to the rights already granted by him to the plaintiff. Disposition of
owner of two
tenements.

Assuming then that the windows were made within 20 years, but before the lease made to Coutts, Gorham's present interest is derived from the same lessor at a subsequent period, and is therefore subject to the rights which Coutts already had against his lessor, and, consequently, to that of his having the windows in question free from any obstruction."

*Coutts v.
Gorham.*

The case of *Compton v. Richards* (i) differs from the authorities already cited, by reason of the easement, for the disturbance of which the action was brought, not being in existence at the time of executing the instrument under which the right was held to arise. *Compton v.
Richards.*

The house in question was one of a range of buildings, called the Royal York Crescent, at Clifton; the Crescent had been commenced in 1791, but, in consequence of the failure of the original owner, passed into various hands, and a part, comprising the houses of the plaintiff and defendant, was put up for auction in 1810; the defendant purchased No. 14; the plaintiff, in 1812, took a lease of No. 13 from the party who purchased it at the sale.

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By one of the conditions of sale, the buildings, according to a plan of the Crescent produced at the sale, were to be completed within two years from that time, which period had elapsed previous to the granting the lease of No. 13 to the plaintiff. After the expiration of the two years, the defendant erected an additional room at the back of his house, one side of the room being formed by elevating the wall which separated the gar-

(i) 1 Price, 27.

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owner of two
tenements.

*Compton v.
Richards.*

dens of Nos. 13 and 14, the effect of which was to diminish the quantity of light previously admitted through the plaintiff's windows. It appeared, that at the time of the sale, although the houses were unfinished, yet the spaces intended for the windows in question were actually opened in the walls: the plan produced at the sale showed the situation and number of the windows intended for each house. There was no stipulation as to the height to which the garden walls might be raised; but other buildings, in the same direction, were expressly limited to the height of 20 feet.

At the trial, before *Graham*, B., the learned judge nonsuited the plaintiff, giving him leave to move to enter a verdict.

[67] A rule having been obtained, which the court made absolute, it was argued in support of it, that the rights of both parties were clearly pointed out at the time of the sale by the common vendor, which was admitted by *Thompson*, C. B., to be tantamount to an express agreement that such rights should not be obstructed. The spaces too, it was further argued, intended for the windows, being actually opened, the purchaser was fully aware what he was going to buy, as the exterior sufficiently exhibited to him what he would be entitled to enjoy.

Thompson, C. B., in delivering judgment, said,
“ This purchase must be taken to have been subject to
“ certain conditions at the time of sale, and as *these*
“ *unfinished houses were at that time so far built as*
“ *that the openings*, which were intended to be supplied
“ with windows, were sufficiently visible as they then
“ stood, we must recognize an implied condition, that
“ *nothing would afterwards be done by which those*

“ windows might be obstructed ; and the purchasers
 “ must have taken subject to what then appeared.

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“ The case of *Palmer v. Fletcher* (*k*) is strong and
 “ clear, and has been often quoted, and the effect of that
 “ case is, that where a man sells a house, he shall not
 “ afterwards be permitted to disturb the rights which
 “ appertain to it ; and the windows of this house, being
 “ opened at the time, necessarily imported their non-
 “ obstruction.”—“ It is sufficient for the purpose of
 “ maintaining this action, if the erection of any building
 “ on the wall be the doing of an act whereby the plain-
 “ tiff has sustained a derogation of any right which he
 “ acquired by his purchase. If so, it is what the original
 “ owner could not have done ; and all lessees claiming
 “ under him are equally bound by the transfer.”

Wood, B., said, “ I consider Dr. Compton claiming
 “ here a right by grant, and when this house was granted
 “ to Auriol (the plaintiff’s lessor) he became grantee of
 “ everything necessary to its enjoyment, as much as if
 “ it had been said at the time, that no one should
 “ obstruct the light which it then enjoyed ” (*l*).*

[68]

(*k*) 1 Levinz, 122.

well, B., in *Glare v. Harding*, 27

[(*l*) The judgment of *Bram-* L. J., Exch. 292, explains the

* *Murkie v. Bluck* (19 C. B., N. S. 190) was decided on the same principle. Graham put up land for sale in lots, upon condition that the purchaser of each lot should build on it according to a specified elevation. The plaintiff purchased one lot, on which stood a wall, the defendant the adjoining lot. Before the lots were conveyed the defendant, in excavating the land bought by him in order to build according to the conditions, deprived the wall of its lateral support, and it fell. Per *Erls*, C. J., “ If there had been a simple conveyance to the defendant of lot 6, lot 7 would have been entitled to support as well
 “ at law as in equity, according to the series of authorities cited by
 “ Mr. James. But the question is, whether there is not in the con-
 “ veyance of 1860 that which justifies what otherwise would have been

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Where, however, the easement is of such a nature as to have no separate and distinct existence during the

principle upon which it is to be determined, whether the doctrine discussed in this section of the text applies to any particular case. He said, "With regard to the right of way," . . . "the plaintiff's title was derived from the lease, and unless the lease granted the right it did not exist. It did not grant the right in terms, and the only way he could grant it was, that the condition of the premises at the time the lease was granted showed that it was intended that the right of way should be exercised, upon the principle of law that by the devolution of two tenements originally held in one ownership, a right of way to a particular door would, as an apparent and continuous easement, pass to the owner. But I think that the way in question was not a continuous and apparent easement within that principle of law. I found my opinion upon the condition of the

premises at the time when the way was granted, there being then only excavations for foundations with openings, which were of a wholly uncertain character, and would have been equally appropriate for a door, a window, or any other of the purposes for which such an opening might possibly be applied." The reasoning of the learned Baron may seem to be inconsistent with the authorities already referred to, which confirm the opinions expressed by the author in the second edition of this work, that upon the severance of a tenement there is no implied grant of such easements as ordinary ways, but the inconsistency is only apparent, it being obvious that there are some cases of ways where the *necessary* and *permanent* dependance of a house upon an adjoining tenement is exhibited by some permanent sign, i. e. "part of the structure," for the enjoy-

"an actionable wrong on the part of the defendant. If the defendant had simply dug so near the plaintiff's land as to deprive it of the lateral support it was entitled to, he would, no doubt, have been liable to an action. But here the vendor, being the owner of both lots, sells lot 6 to the defendant; and according to the terms of the contract by which it is conveyed to him, he makes it obligatory on him to do, or at all events within the provisions of that contract he was only doing, his duty to his vendee when he did the act which brought down the plaintiff's house." (See *Fewster v. Turner*, 6 Jur. 144; 11 L. J., Ch. 161.)

The landlord of two houses granted a lease of one in consideration of the lessee adding windows. The tenant of the other, having afterwards surrendered his lease and taken a new one, was precluded from obstructing the new windows. (*Duries v. Marshall*, 7 Jur., N. S. 720.)

continuance of the unity of ownership, there, upon the severance, no such consequences will ensue.

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ment of which a way is necessary, as, for instance, in the case of two adjoining houses, where the coal shoot used for filling the cellar of one opens in the yard of the other, or in the case of two adjoining houses standing in a garden, the hall doors of the houses opening into the garden, and there being ways from the hall doors to the high road: if in the first case the owner conveys one house to a purchaser, or if in the latter case the owner of the houses and garden conveys one house to a purchaser, it is presumed that he could not in the first case prevent the purchaser from filling his cellar through the shoot, nor in the second from getting into the highway from his hall door through the garden, because in the first the coals might be brought through the door, or in the second because there happened to be a back entrance through a stable yard from a mews in the rear, so as to prevent a way of absolute necessity from being set up through the garden.

Even in the case of drains, referred to in the authorities already cited, the easement is not strictly "continuous:" the drain is not always flowing, but there is a necessary and permanent dependence of the house upon it for its enjoyment as a house, in the state in which it is at the time of the conveyance; nor is any distinction drawn between drains arising by

the act of man, and those from natural causes, as rain water.

In the case of a landlocked house there is an *absolute* necessity for a right of way to it.

In such cases as *Pyer v. Carter* (p. 101), there is not an absolute necessity, for the plaintiff might have made a drain through his own land for a mere trifle.

Richards v. Rose (p. 102) was treated as a case of absolute necessity.

Worthington v. Gimson (p. 90) was a case where there were two roads to a market town from a farm, the only difference being that one was shorter than the other. A claim of a right of way into the shorter was set up, on the ground that the existence of a cart way at the time of the conveyance, indicating that the shorter way had been used before the conveyance of the farm, together with the fact of the user, were sufficient to bring the case within the rule. The distinction between such a case,—where the farm might be perfectly well enjoyed as a farm with either road, and that of the house which has been put where the use of way from the front door to a highway, though not absolutely necessary (as in the case of a landlocked tenement), is necessary in order that the house may be enjoyed in the ordinary manner as a dwelling-house at all,—is obvious; but, in truth, the point was

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In 11 H. 4, 5, pl. 12, Hank demanded of Huls—"If a man has a way appendant to his frank tenement to go

not raised, because the question of necessity was not left to the jury, doubtless for want of evidence upon it.

Pheysey v. Vicary (p. 107) was a peculiar case, which was ultimately compromised upon terms, nor was the question of necessity ever left to the jury. If it had been, the court would have had an opportunity of dissenting from *Hinchcliffe v. Earl of Kinnoul* (p. 96).

There appear to be two classes of cases.

1. Where there is no *absolute* necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a *necessary dependence*, in order to its enjoyment in the state it is in when sold, upon the adjoining tenement.

2. Where there is an *absolute necessity*, as in the case of a land-locked tenement, or in such cases as *Richards v. Rose*, where the houses could not exist as houses *at all* without mutual support.

The first class of cases are those which the author describes under the head of disposition of owner of two tenements; and it is a question of fact for a jury to say whether the easement claimed is necessary for the use of the house, or any part of it.

It seems that there are some cases of ways which would fall within the first class, namely, ways which are *essential* to the enjoy-

ment and use of those things which are the subject of the grant, as in the case put of the coal shoot and hall door. The judgment of the Court of Common Pleas in *Hinchcliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1, is conclusive upon this point. It is obvious that a hall door is as necessary to the convenient enjoyment of a dwelling-house for entrance by the hall, as a coal shoot for putting coals into the cellar, and that neither are the less so because persons may get into the house through a stable and kitchen, or may bring their coals in through the doors or windows; and as, in *Hinchcliffe v. Earl of Kinnoul*, the court was of opinion that a right of way to the coal shoot would be implied, the jury having found that a right of way to it was necessary, so it should seem that it would also have held that it would be implied to the hall door in the case suggested above.

The judgment in *Hinchcliffe v. Earl of Kinnoul* establishes, that upon the conveyance of a house "consisting of certain parts," easements necessary to the use of those parts, as they actually stood at the time of the conveyance, pass by implied grant without reference to the question of absolute necessity, in the sense that the person to whom the house is conveyed might possibly be able so to alter the construction of the house as to be able to dispense with those

over the land of another, if he purchase the land in which he has the way, and afterwards the same land in which

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easements; and, as it has been either in *Pheysey v. Vicary* or already pointed out, the same *Worthington v. Gimson*.]* question was never really raised

* On this ground the judgment of the Queen's Bench in *Pearson v. Spencer* (1 B. & S. 571) was affirmed in error (3 B. & S. 761). The plaintiff and the defendant claimed under the same devisor. The only way to the defendant's land was through the plaintiff's. The devise to the defendant made no mention of ways, but there was a road through the plaintiff's land which the devisor had used, and which for some distance skirted the hedge of the defendant's land until it came to a gate; and the question was, whether the defendant had a right of way along the road used by the devisor, or only up to the point where it joined his hedge. The Exchequer Chamber say, "We sustain the judgment of the court below on the construction and effect of James Pearson's will, taken in connexion with the manner in which the premises were enjoyed at the time of the will. The devisor had unity of possession of all this property. He intended to create two distinct farms, with two distinct dwelling-houses, and leave one to the plaintiff and the other to the party under whom the defendant claims. The way claimed by the defendant was the sole approach that was at that time used for the house and farm devised to him. Thus the devise of the farm contained, under the circumstances, a devise of a way to it, and we think the way in question passed with that devise. It falls under the class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a necessary dependance in order to its enjoyment in that state it is in when devised upon the adjoining tenements. These are rights which are implied, and we think that the farm devised to the party under whom the defendant claims could not be enjoyed without dependance on the plaintiff's land of a right of way over it in the customary manner."

But where a devise was of a house "as now in the occupation of Answood," Answood, the devisor's tenant, used a pump on other land of the devisor: it was held, that an easement to use the pump did not pass by the devise. *Erle, C. J.*, says, "There is a distinction between easements, such as a right of way, or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction; and it is clear law, that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant, but with regard to easements which are used from time to time only,

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he had the way passes into strange hands, if he shall still have the way or not." Huls says, "He shall have it and use it, for that a way is more necessary to a man than any other appendant; but if it had been common appendant, it would have been extinct *in perpetuum*." Hank: "In this regard I don't see any diversity, for without having pasture for any beasts my land cannot be (gayne); so one is as necessary as the other." Culpepper: "The unity of possession in the one case, as well as the other, extinguishes everything." Hank: "A man cannot have any appendancy in his own soil; and when he purchases the land in which he has the way, the way is no longer appendant, for he may make what ways he pleases in his own soil, though he had not any there before, by reason of the property which he has in the soil, by which the appendancy is extinct; and if the appendancy be extinct, and the appendancy is the reason of the title, *ergo*, the way is gone for ever."

[69]

*Shury v.
Piggott.*

In *Shury v. Piggott* (m) it is laid down that all ways of convenience are extinguished by unity of possession, but not ways of necessity.

So in *Tyrringham's case* (n) it was resolved, that unity of possession of the land to which &c., and of the whole land in which &c., makes extinguishment of common appendant; "when a man has as high and perdurable an estate as well in the land as in the rent, common, or other profit issuing out of the same land, there the rent,

(m) 3 Bala. 339.

(n) 4 Rep. 38.

"they do not pass unless the owner by appropriate language shows an intention that they should pass." And he intimated that if the will had been, "I devise the house as now enjoyed by Answood," the easement might have been created on the authority of *Bodenham v. Pritchard* (1 B. & C. 350). (*Polden v. Bastard*, 4 B. & S. 258; L. R., 1 Q. B. 156.)

common, and profit, is extinct; and therewith agrees 24 E. 3, 25 " (o). Disposition of owner of two tenements.

In *Dyer*, 295 b, pl. 19, it is doubted whether, where two men were seised of adjoining closes (one being bound to repair the fence between them), and one becomes the owner of both closes, and removes the fence, the prescription was destroyed, or revived upon the lands descending, at his death, to his daughters, as coparceners.

In *Sury v. Pigott* (p), it is clearly laid down, that the right to have the fence kept up is extinguished by unity of ownership; and this seems now to be distinctly settled (q).

[It has already been pointed out by the learned author that there is no distinction between the different kinds of easements as to their being extinguished by unity of ownership. The distinction is, that upon a subsequent severance of the tenements those easements arising from "the disposition of the owners of two tenements," and easements of necessity, are created *de novo* by implied grant, while other easements require express words of grant to create them.]

The current of authority in the civil law is in favour of the position, that all servitudes, indiscriminately, were extinguished by unity of ownership, and that none were revived by a subsequent severance, except possibly those of necessity (r); and although it was competent to the

(o) 11 H. 7, 25 pl. 26.

(p) *Palmer*, 444.

(q) *Boyle v. Tamlyn*, 6 B. & C. 329.

(r) *Marcellus* respondit, qui binas ædes habebat, si alteras le-

gavit, non dubium est quin hæres (alias) possit altius tollendo obscurare lumina legatarum ædium. Non autem (semper) simile est itineris argumentum: quia sine accessu nullum est fructus legatum:

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owner of two tenements, on alienating one of them, to impose a servitude upon it, for the benefit of the one he still retained, or *vice versâ* (*s*); and such imposition, even though, in terms, binding on the person of the possessor only, would, nevertheless, bind the servient tenement, into whose ever hands the two tenements respectively might pass (*t*); yet, unless the precise nature of the servitude was specified upon alienation, no obligation whatever was imposed; the general expression, "*quibus est servitus utique est*," was binding as to strangers only; and even the general reservation, that the alienated tenement "should be servient," appears to have been insufficient to prevent the vendee from disturbing the servitudes of his vendor.

[71] It would appear, however, that the insertion of the clause, "*quibus est servitus utique est*," would in such a case prevent the purchaser of one tenement from disturbing a manifestly existing servitude of the other, supposing the owner to alienate both at the same

habitare autem potest et ædibus obscuratis.—L. 10, ff. de serv. præd. urb.

(*s*) Duorum prædiorum dominus, si alterum cā lege tibi dederit, ut id prædium, quod datur, serviat ei quod ipse retinet, vel contrā: jure imposita servitus intelligitur.—L. 3, ff. comm. præd.

(*t*) Cum fundo, quem ex duobus retinuit venditor, aqua: ducendæ servitus imposita sit, empto prædio quæsitæ servitus distractum denuo prædium sequitur; nec ad rem pertinet, quod stipulatio, qua pœnam promitti placuit, ad personam emptoris, si ei forte frui non licuisset,

relata est.—L. 36, ff. de serv. præd. rust.

In tradendis unis ædibus ab eo qui binas habet, species servitutis exprimenda est: ne si generaliter serviro dictum erit, aut nihil valeat quia incertum sit quæ servitus excepta sit, aut omnis servitus imponi debeat.—L. 7, ff. comm. præd.

Si cum duas haberem insulas duobus eodem momento tradidero, videndum est, an servitus alterutris imposita valeat: quia alienis quidem ædibus nec imponi nec adquiri servitus potest; sed, ante traditionem peractam suis magis acquirit vel imponit is qui tradit, ideoque valebit servitus.—L. 8, Ibid.

time (*u*). On the other hand, there is one passage in the Digest which distinctly recognizes the principle of the disposition by the owner of two tenements (*v*). Disposition of owner of two tenements.

SECT. 2.—*Easements of Necessity.*

Another class of easements acquired by implied grant are those which are usually termed “Easements of Necessity,” though they might with more correctness be called—Easements incident to some act of the Owners of the Dominant and Servient Tenements, without which the intention of the parties to the severance cannot be carried into effect.

The easement called a Way of Necessity is, in reality, only a single species of this class, and is necessary “only in a partial sense, as being a necessary incident” (*w*) to the instrument creating the estate to which the easement is appendant.

In *Dand v. Kingscote* (*x*), it was held, that under an exception of all seams of coal, and of a reservation of right to dig pits for getting such coal, all things that were dependant on that right and necessary for the *Dand v. Kingscote.*

(*u*) Quidquid venditor servitutis nomine sibi recipere vult, nominatim recipi oportet: Nam illa generalis receptio, “quibus est servitus utique est,” ad extraneos pertinet, ipsi nihil prospicit venditori ad jura ejus conservanda: nulla enim habuit: quia nemo ipso sibi servitutem debet: quinimo, et si debita fuit servitus, deinde dominium rei servientis pervenit ad me, consequenter dicitur extingui servitutem.—L. 10, ff. comm. præd.

(*v*) Binas quis ædes habebat unâ contignatione tectas; utrasque di-

versis legavit. Dixi—ex regione cujusque domini fore tigna; nec ullam invicem habituros actionem, jus non esse immissum habere. Nec interest, purè utrisque, an sub conditione alteri ædes legatæ sint.—L. 36, ff. de serv. præd. urb.; [and see the Dutch “Cousultation,” 2 Deel, casus 145.]

(*w*) 1 Wms. Saund. 323*n*.; 1 Notes to Saund. 570; *Finchcliffe v. Lord Kinnoul*, 5 Bing. N. C. 24.

(*x*) 6 M. & W. 196.

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obtaining it were reserved also, according to the rule in Sheppard's Touchstone, p. 100 ; and that, consequently, the coalowner had, as incident to the liberty to dig pits, the right to fix such machinery as would be necessary to drain the mines, and draw the coals from the pits.

[72]
Liford's case.

So, in *Liford's case* (y), where a lessor excepted all trees of a certain age growing on the estate demised, and the lessee brought an action of trespass against certain parties claiming under the lessor, for entering upon the lands to see the condition of the trees: it was resolved by the whole court, that, "when the lessor excepted the trees, and afterwards had an intention to sell them, the law gave him and them who would buy, power as incident to the exception, to enter and show the trees to those who would have them, for without sight none would buy, and without entry they could not see them ; as in 9 H. 6, 29 b, a man seised of a house in a borough, &c., devisable, devised it to a woman in tail; and if the woman died without issue, that his executor might sell and dispose of it for his soul ; in that case the executor might, by the law, enter into the house to see if it was well repaired or not, to the intent to know at what value the reversion is to be sold. Quod fuit concessum per totam curiam. The law gives power to him who ought to repair a bridge to enter into the land, and to him who has a conduit on the land of another to enter into the land to mend it, when occasion requires ; as it is resolved 9 E. 4, 35 a. So it is agreed in 2 R. 2, Bar. f. 237. If I grant you my trees in my wood, you may come with carts over my land to carry the wood. Lex est cuicunque aliquis

(y) 11 Report, 52; *Darcy v. Askwith*, 11 Hobart, 234.

quid concedit, concedere videtur et id, sine quo res ipsa esse non potuit; and this is a maxim in law.*

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From this, as well as other authorities, it appears that the inference of law arises equally whether the easement is incident to a grant or a reservation (z).

Easements of this nature are thus described in Rolle's Abridgment— [73]

“If I have a field enclosed by my own land on all sides, and I alien this close to another, he shall have a way to this close over my land, as incident to the grant; for otherwise he cannot have any benefit by the grant.

“And the grantor shall assign the way where he can best spare it.

“So, too, if the close aliened be not entirely inclosed by my land, but partly by the land of strangers; for he cannot go over the land of strangers. Quære (a).”

The Chapter of Rolle, in which these sections occur, is headed—“In what case one thing shall pass by grant of another—Incidents”—and the first pl. is, “The grant

[(z) *Pennington v. Galland*, 9 1 Notes to Saund. 570; Vin. Abr. Exch. 1, acc.] Grantz, Z. pl. 17, 18; *Clark v.*

(a) 2 Rolle, Abr. tit. Grant, Z. *Cogge*, Cro. Jac. 170. pl. 17, 18; 1 Wms. Saund. 323, n.;

* See also *Hodgson v. Field*, 7 East, 613; *The Earl of Cardigan v. Armitage*, 2 B. & C. 207; *Proud v. Bates*, 11 Jur., N. S. 441; 34 L. J., Ch. 406. On the grant of the surface of land for a railway, if a certain amount of lateral support is essential for the safety of the railway, the right of support must pass as a necessary incident of the grant, and this whether the conveyance is voluntary or compulsory. (*Ellipt v. North Eastern Railway Company*, 10 H. of L. Cas. 356, per Lord Chelmsford.) The grantor in such case is considered as granting and warranting such a measure of support, subjacent and adjacent, as is necessary for the land in its condition at the time of the grant, or for the state for the purpose of putting it into which the grant was made. (Per Lord Cranworth, *Caledonian Company v. Sprot*, cited per Lord Chelmsford, 10 H. of L. Cas. 356.)

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of a thing passes every thing included therein, without which the thing granted could not be had:" pl. 16, is "If a man grant or reserve wood, that implies liberty to take and carry it away;" thus evidently treating it as a necessary implication of the intention of the grantor, as in the case of all other incidents which the law attaches to grants.

The general rule is thus stated by Serjeant Williams: "Where a man, having a close surrounded with his own land, grants the close to another in fee, for life or years, the grantee shall have a way to the close over the grantor's land, as incident to the grant, for without it he cannot derive any benefit from the grant. So it is where he grants the land and reserves the close to himself (*b*)."

[This statement of the law by Serjeant Williams was recognized and acted on by the Court of Exchequer in *Pinnington v. Galland* (*c*).]*

Jorden v.
Atwood.

[74]

In *Jorden v. Atwood* (*d*), the defendant was seised of a messuage which had a way appendant to it over a certain close; it appears to be admitted in the argument, that there was no other way to the house; this close the defendant bought, and afterwards enfeoffed the plaintiff thereof, making no reservation of the way; and the present action was brought for the defendant continuing to use the way. The judges differed in opinion, some holding that the way was not extinguished; others, that it was the defendant's own folly not to have reserved

(*b*) 1 Wms. Saund. 323, n.; 1
Notes to Saund. 570.

(*c*) 9 Exch. 12.

(*d*) Owen, 121. See Rol. Abr.

and Vin. Abr. Extinguishment,
C. pl. 8, 10, 11; Vin. Abr. Com-
mon, E. a. pl. 16.

it; but judgment was given for the defendant. But it is stated in 2 Sid. 111, that, on searching the roll in this case, it was found that judgment was given for the plaintiff.

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In *Packer v. Welsted* (e) there was a special verdict, finding that there were three parcels of land, and the necessary and private way was out of the first into the second, and out of the two first into the third parcel. J. S. purchased the three parcels, and then aliened the two first to J. N.: and the question was, if he should have a way over the two first parcels to his third parcel. The jurors also found, that the alienation was by feoffment, and that there was no other way to come at the land not aliened but over the other land.

Packer v.
Welsted.

After two arguments, the court gave judgment for the defendant, "that he might take a convenient way without permission (*sans le gree*) of the plaintiff, and the law would then adjudge whether such way were convenient and sufficient or otherwise." *Glyn, C. J.*, observed, "That it could not properly be called a right of way (before the alienation), because no man could have such right in his own soil; but that as the jurors had found the way to be of necessity, it would remain, for it would be not only a private inconvenience, but also to the prejudice of the public weal, that the land should be fresh and unoccupied."

[75]

In *Dutton v. Taylor* (f), which was an action of trespass q. c. f., the defendant justified as tenant to one R. Cleadon, who was seised *simul et semel* of two closes, the only road to the second from an ancient highway being across the first close; this latter close Cleadon

Dutton v.
Taylor.

(e) 2 Siderfin, 39--111.

(f) 2 Lut. 1187; *Buckby v.*
Cbles, 5 Taunt. 311.

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sold to one Astbury, but still continued to use the way across it, although there was no reservation of any right of way in the deed of conveyance.

It was objected, the law would not imply any reservation by the vendor where none was expressed, *sed non allocatur*. "For it is apparent by the plea, that it is a way of necessity, and it is *pro bono publico* that the land should not be unoccupied."

Howton v.
Frearson.

In *Howton v. Frearson* (*g*) the court held that a way of necessity over the grantor's land would equally be implied as incident to a grant, though the granting party was a trustee: but Lord *Kenyon* expressed doubts as to the correctness of the general principle laid down in the case above cited.

[In the case of *Pinnington v. Galland* (*h*), it is distinctly decided, that a way of necessity arises by implied reservation in favour of the grantor as well as against him. See the judgment page 12. In the last-mentioned case, the owner of two closes, one of which was only accessible over the other, conveyed the former to A., the latter to B., and it did not appear which conveyance was first executed, but the conveyance to A. contained the words "with all ways belonging or appertaining." The court held, that, whichever was first conveyed, A. had a way over B.'s close; for if the conveyance to A. was first, A. would have a way of necessity by *implied* grant, and if the conveyance to B. was first, then the owner of the remaining close would have had a way of necessity by implied reservation, which upon the conveyance to A. passed to him, by the words all ways appertaining, or, indeed, as the court suggested, without those words, and this for the same reason

(*g*) 8 T. R. 50.

(*h*) 9 Exch. 1.

which originally created it; that the way was necessary to the enjoyment of the land granted, and therefore would pass without express words, and, these two things concurring, the grantee would have the way upon the principle of the maxim, “*Cuicunque aliquis quid concedit, concedere videtur et id, sine quo res ipsa esse non potuit*,” just as if the grantor of the land were owner of the adjacent land, instead of being only the owner of a way over it.]

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Ways of necessity, of a different kind, are mentioned by *Dodderidge, J.*, in *Shury v. Pigott (i)*,—ways “to the church or to market.”*

Under this head, likewise, come easements incident to the rights which a party has in virtue of his office, as a right of entry in the parson to take away his tithes; *Payne v. Brigham (k)*; and also a right to make the grass into hay on the land where it grew (*l*).

[76]

It would seem from an observation of *Mansfield, C. J.*, in *Morris v. Edgington (m)*, that although in these cases there might exist some other mode of access, yet, if the way claimed “was necessary for the most convenient enjoyment” of the thing demised, it would be a way of necessity. This doctrine, however, seems opposed to the principle (*n*) on which the right to ways of necessity is supported; and appears to have been

(i) 3 Bulstrode, 340.

pl. 3.

(k) 2 Lutw. 1313.

(m) 3 Taunt. 28.

(l) 1 Rollo, Abr. Dismes, X.

(n) Ante, p. 134.

* *Dodderidge* is here speaking of a customary right of way for the inhabitants of a parish or district to go to church or to market, and not of an easement. (See *Drake v. Wigglesworth*, Willes, 658, and post, Chap. VI. Sect. 3, n.)

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repudiated by the Court of Exchequer in *Pheysey v. Vicary* (o).*

In an anonymous case (p), it is said, per curiam, "If a man, either by grant or prescription, have a right to wreck thrown upon another's land, of necessary consequence he has a right to a way over the same land to take it."

And again, in *The Queen v. Inhabitants of Cluworth* (q), by Holt, C. J., "If one have land adjoining on a navigable river, every one that uses that river has, if occasion be, a right to a way by brink of water over that land, or farther in, if necessary."

This general right to tow along the banks of navigable rivers is denied in *Ball v. Herbert* (r), unless founded either on statute or custom.

Clark v. Cogge. In *Clark v. Cogge* (s), upon demurrer, the case was—

"The one sells land, and afterwards the vendee, by reason thereof, claims a way over part of the plaintiff's land, there being no other convenient way adjoining, and whether this was a lawful claim was the question; and resolved without argument, that the way remained, and that he might well justify the using thereof, because it is a thing of necessity; for otherwise he could not have any profit of his land. Et e converso—If a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any land thereto

(o) 16 M. & W. 484. [See the remarks on this subject, ante, p. 125, note.]

(p) 6 Mod. 149.

(q) 6 Mod. 163.

(r) 3 T. R. 253.

(s) Cro. Jac. 170.

* See *Dodd v. Burchell*, 1 H. & C. 113; *Pearson v. Spencer*, 3 B. & S. 767.

but through one of those which he sold, although he reserved not any way, yet he shall have it as reserved unto him by the law: and there is not any extinguishment of a way by having both lands."

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The concluding observation evidently refers to the kind of way here spoken of—a way of necessity: but whether it does or not is immaterial to the authority of the case, which did not turn upon any question of extinguishment, but upon the new title implied by law.

The accessorial right which the law thus confers is to be measured by the nature of the grant or reservation to which it is incident (*t*), and it has been held to cease, when it is no longer required in order to render such grant or reservation effectual.

Thus, in *Lord Darcy v. Askwith* (*u*), where an action of waste was brought against the defendant for felling oak trees. The only question was—whether the lessor by leasing coal mines did, by implication of law, give power to the lessee to sell timber for the use of the coal mines. It was agreed that the grant of a thing did carry all things included, without which the thing granted could not be had. But this case was adjudged *undâ voce* against the defendant; for it must be understood of things incident and directly necessary. Thus, if I give you the fish in my waters, you may fish with nets, but you may not cut the banks to lay the waters dry. If I grant or reserve woods, it implies a liberty to take and carry them away.

*Lord Darcy v.
Askwith.*

[78]

In *Wiseman v. Denham* (*x*) the plaintiff declared that

*Wiseman v.
Denham.*

(*t*) See *Dand v. Kingscote*, 6 M. & W. 174.

(*u*) Hobart, 234.

(*x*) Palmer, 341—381; vide

etiam *Shapcott v. Muggford*, 1 Lord Ray. 187; *South v. Jones*, 1 Strange, 245; 1 Rolle, Rep. 172; 420.

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reservation.

there was a custom for every parishioner to pay to the parson the sixteenth cheese, as tithe for cheese on a certain day, and that he tendered to the parson (obtulit) a certain number, being the fifteenth of what he made; that the parson refused to receive them, and suffered them to remain in the plaintiff's house for half a year, doing damage to him, &c. After verdict for the plaintiff, it was moved in arrest of judgment, that no action would lie; but the court were of opinion, that such an action was maintainable.

If a parishioner duly sets out his tithe of hay, and requires the parson to carry it away, but he doth not do so in convenient time, whereby the grass where the hay lay is spoilt, an action on the case lies against the parson (*y*).

Holmes v.
Goring.

[79]

In *Holmes v. Goring* (*z*) the defendant, having been previously entitled to a way of necessity over certain closes, purchased these closes, together with certain other pieces of land adjoining the close to which the way of necessity led: he subsequently sold two of the closes over which the way of necessity had been used, together with some portions of the land adjoining, which prevented his having access over his own land to those closes to which the right of way had originally been enjoyed. These portions had, however, been repurchased by him long before the present action was brought, at which time he could have had as convenient access over his own land as over that occupied by the plaintiff.

The question to be decided was, whether the way of

(*y*) 1 Rolle, Abr. 109, Action
on the Case, N. pl. 36.

(*z*) 2 Bing. 76; S. C. 9 Moore,
166.

necessity—which was admitted to have existed when the defendant sold the close now occupied by the plaintiff—was defeated by the fact, that, by a subsequent purchase, he was enabled to approach the close to which, &c. over his own land; the defendant contending that the necessity of the way was to be considered with reference to the condition of the property at the time of the sale of the two closes.

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grant and
reservation.

*Holmes v.
Goring.*

The court held that the way of necessity ceased as soon as the defendant had any other means of access to the close to which it led. “A way of necessity,” said *Best*, C. J. (citing Serjeant Williams’s note to Saunders), “when the nature of it is considered, will be found to be nothing else than a way by grant; but a grant of no more than the circumstances which raise the implication of necessity require should pass. If it were otherwise, this inconvenience might follow, that a party might retain a way over one thousand yards of another’s land, when, by a subsequent purchase, he might reach his destination by passing over one hundred yards of his own. A grant, therefore, arising out of the implication of necessity cannot be carried further than the necessity of the case requires, and this principle consists with all the cases which have been decided.” *Park*, J., added, “From all the authorities referred to, it is clear that when a way is claimed by necessity, it is a good answer to show that there is another way which the party may use.”

[80]

Burrough, J., expressed his opinion to be, “That there must be a necessity continuing up to the time of the trespass justified under it.”

The opinion here expressed by *Burrough*, J., appears

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grant and
reservation.

*Reignolds v.
Edwards.*

to be in accordance with the decision of the Court of K. B. in *Reignolds v. Edwards* (a); the defendant's lessor had a prescriptive right of way over the plaintiff's land to a close which was encircled by land of the plaintiff. Twenty-four years before the action was brought, the plaintiff stopped up the old way and opened a different one, which latter, after being used by the defendant's lessor during that period, the plaintiff also stopped up, and brought the present action of trespass for the use of it by the defendant, and his removal of a gate erected across it by the plaintiff. The court held that the new way could not be claimed as a way of necessity, as it did not appear "that there was no other way, but only that there was no other passage open;" and that as the plea set forth a right of way by prescription, which the plaintiff had admitted by demurring to the plea, that was sufficient to prevent the defendant being entitled to this as a way of necessity. That it was, in fact, but a way of sufferance, and upon the plaintiff determining his will by erecting the gate, the defendant should have had recourse to his old right.

*Buckby v.
Coles.*

[81]

The case of *Buckby v. Coles* (b) appears from the facts as stated in the report to be somewhat at variance with the doctrine above laid down, as during the time in which there was a unity of the whole property there appeared to have been another approach to the close, to which, &c. besides the previously existing way of necessity, and as this new approach existed at the time of severance, the former necessity must, of course, have ceased. There appears, however, to be some confusion in the facts, as the jury expressly found, that, at the time

(a) Willes, 282.

(b) 5 Taunt. 311.

of the trespass for which the action was brought, there existed no other way but the one claimed by the defendant.

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grant and
reservation.

Dallas, J., said, "the question on the issue is, whether there was any other way. The evidence on the defendant's side is, that there was no other way. The plaintiff meets it by evidence that there was another way, though not quite so convenient; and the jury have had it before them and have disaffirmed the existence of any other way."

It is, therefore, in fact, an authority to the same effect as the case of *Holmes v. Goring* above cited, [but in the case of *Proctor v. Hodgson* (c), *Parke, B.*, expressed his dissent from the decision in *Holmes v. Goring*, and seemed to be of opinion that a way of necessity, being regarded as a way granted in general terms, ought to be considered a permanent way (d).]

In *James v. Dods* (e) the Court of Exchequer held, *James v. Dods*. that a rector, though entitled to the use of whatever roads existed on the farm for the purpose of carrying

[(c) 10 Exch. 824.

(d) The case of *Proctor v. Hodgson*, was this:—The owner of two closes, to one of which he had no means of access from the highway except by passing over the other, died intestate and without heirs, whereupon the former close vested by escheat in A. and the second in B.; the question was whether A. had a right of way over the second close. The pleadings did not raise the question as to the effect of the escheat, as there was neither an averment that A. had no other way when the close escheated to him; nor that there

was no other way at the time of the trespass; the first of which was clearly necessary, and the second so, if *Holmes v. Goring* was good law. The court, however, appears to have been of opinion that no way of necessity could possibly be claimed under the circumstances; and, indeed, to hold otherwise, it would involve the proposition, "that whenever a man has no other way he may go over his neighbour's close," which is certainly not law.]

(e) 2 C. & M. 266. Vide cases there cited.

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grant and
reservation.

James v. Dods.

away his tithes, had no right, except by express grant or prescription, to prevent the occupier from making such alterations as were advantageous to his land, though the accustomed road was thereby stopped up, provided such alterations were made *bonâ fide*, and not with any vexatious intention towards the tithe-owner.

Lord *Lyndhurst*, C. B., said—"In this case there was no evidence to establish a right of way by prescription or grant; and there is no evidence to show that the farmer ever carried his nine-tenths by the way claimed.

[82] The tithe-owner has a right to the same road as the farmer uses to carry his nine-tenths; and it appears to me, that if the farmer, acting completely *bonâ fide*, alters the line of road to his farm, he has a right to do so, and the parson must use the substituted road, and has no remedy except under a prescription or grant. If there were such a right as is here claimed by the plaintiff, it would prevent the farmer from altering the road in the slightest degree, and it is not pretended that he may not make a slight deviation. Now here, there was no evidence that the farmer ever did use the way for the purpose of carrying away his nine-tenths; and the evidence of user by the parson is limited to two or three instances. It does not appear to me that there was any thing to prevent the defendant acting *bonâ fide* from setting out another way for the convenient management of the farm. Here the defendant *bonâ fide* stopped up the old way and set out another: and the plaintiff has, therefore, no right to use the old way. The action, therefore, cannot be sustained."

Bayley, B.—"This action is founded on the supposition that the plaintiff has a right of way, in the use of which he has been obstructed. There is no doubt that

a tithe-owner has a right to use the way from time to time used by the occupier for the purpose of carrying off his nine-tenths. Originally, I should say, that the parson's right was to follow the farmer's road to his homestead, and thence to get to the road towards the parsonage. He may have a further right; and it is suggested that he has the right to use all the roads used for the cultivation of the farm. I will not say that he has it not, but that right results from the farmer's conduct and management of the farm, and is co-extensive with the usage for the purposes of cultivation, and does not put an end to the farmer's right to stop up the road. There may be a right by grant, or by prescription which presupposes a grant by the owner of the inheritance, to which the owner or occupier cannot act in opposition; but if no such right exists, it seems to me that the tithe-owner is not entitled to use a way, merely because it is most convenient to himself, or because the occupier, for his own convenience, has sometimes used it. Here, there was no evidence to establish such claim of right. The manner in which the way was used by the landowner furnished no evidence, as it appeared that the opening had been made for purposes of his own, and that his tenant had been in the habit of driving his cattle that way into the road, and three or four times the tithe-owner used it; which might be either because he had leave to use it, or because it was one of the roads used by the farmer. The only question then for us to consider is—whether, in point of law, the circumstance of the way having been used by the farmer a considerable time, gives the tithe-owner a right to keep it open. I am of opinion that it does not.”

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grant and
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James v. Dods.

[83]

In the cases already cited the expression frequently

All easements

G.

L

Presumed
grant and
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extinguished
by unity.

[84]

occurs, that ways of convenience are extinguished by unity of possession, but ways of necessity are not. It appears, however, to be more correct, as well as more in accordance with the general principles of the law of easements, as recognized both by the English and Civil law, to consider all easements, whether of convenience or necessity, as extinguished by unity; but that, upon any subsequent severance, easements which, previous to such unity, were easements of necessity, are impliedly granted anew in the same manner that any other easement which would be held by law to pass as incident to the grant.

Had there been a unity from time immemorial, the law would clearly imply a right of way as incident to a grant, if there existed no other means of such grant taking effect. Why, then, should this anomaly of non-extinguishment be held to be law, when the same result can be obtained from the ordinary principles regulating other easements of the same class?

In none of the numerous cases, in which the question of extinguishment has been discussed, has it been laid down that the *same* right revived upon the severance of the tenements which existed previous to the unity. The utmost extent to which the judges go, is to say that a right of way revives, because the new grant would otherwise be inoperative. Where a party died seised of certain lands and a mill, which descended to his two daughters as coparceners, it was held that an agreement by parol between them, on making partition, that a way should be used to the mill as during the lifetime of their father, was binding on them (*f*). Brooke, in his Abridg-

(*f*) 21 Edw. 3, 2; S. C. 21 Ass. pl. 1.

ment (*g*), says, "The way is revived; *tamen videtur* that it is a new way (nouvel chimine)."

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grant and
reservation.

It is clearly settled, on all the authorities, that, *during the unity*, no way or easement can *exist* in the land (*h*).

All easements
extinguished
by unity.

The language of *Best*, C. J., in *Holmes v. Goring* (*i*), fully supports the doctrine above stated, that all ways are extinguished by unity of ownership: and that ways of necessity are in reality new easements incident to the grant or reservation. "If I have four fields, and grant away two of them, over which I have been accustomed to pass, the law will presume that I reserve a right of way to those which I retain. But what right? The same as existed before? No; *the old right is extinguished*, and the new way arises out of the necessity of the thing. It has been argued that the new grant operates as a prevention of the extinguishment of the old right of way, but there is not a single case which bears out that proposition, or which does not imply the contrary. By the grant a new way is created, and that way is limited by necessity."

Holmes v.
Goring.

[85]

Serjeant *Williams* (*k*) says, "Where a man, having a close surrounded by his own land, grants the close to another, the grantee shall have a way to the close over the grantor's land, as incident to the grant. What way is it the grantee shall have? Not the old, but a new way, limited by the necessity." In *Clark v. Cogge* (*l*) the court says, that "although the grantor in such a case reserve not a way, it shall be reserved for him by law; that is, not the old way, but a new way of necessity,

(*g*) Tit. Extinguishment, pl. 15.

(*h*) 1 Wms. Saund. 323, n.; 1

(*h*) *Morris v. Edgington*, 3 Taunt. 24.

Notes to Saund. 370.

(*l*) Cro. Jac. 170.

(*i*) 2 Bing. 83.

Presumed
grant and
reservation.

All easements
extinguished
by unity.

if he hath not any other way." In *Jorden v. Atwood* (*m*), *Popham*, C. J., says, "If a man has three fields adjoining, and makes a feoffment of the middle field, the feoffee shall have a way (not the way) to this through the other close."

[With regard to the direction of the way of necessity, it was held in *Packer v. Welsted* (*n*), that "defendant (who claimed a way of necessity by implied reservation upon a grant by him) poet prender un convenient chemin sans le gree del plaintiff, et ley poet puis adjudg si ceo soit convenient et sufficient vel plus ou nemy;" and this accords with the decision of the Court of Exchequer in *Pinnington v. Galland* (*o*), where it is laid down that the way would be "the most direct and convenient one." So that the grantee of the way would be allowed to take his way, only subject to the restriction that it should be the most direct and convenient one.

In 2 Rolle, Ab. Graunt, Z. 17, it is laid down, "Feffor assignera le chemin lou il poet melius ceo spare."

This is not inconsistent with the other authorities, being merely to the effect that upon the severance the grantor may assign a way if he chooses. If he does not, then the grantee, i. e. the grantee of the way, may select it.

Further, when once the way is ascertained it can not be altered, *Pearson v. Spencer* (*p*).

In the last case it seems to have been held, that where the severance creating the necessity took place by will, and during the testator's lifetime and at his death the

(*m*) Owen, 121.

(*o*) 9 Exch. 1.

(*n*) 2 Sid. 111, already cited by the learned author.

(*p*) 1 B. & S. 571; affirmed 3 B. & S. 761.

premises were in the hands of a tenant, and there was an existing way by which the tenant used and enjoyed them, the will must be considered as granting the use of that way, although it extended over a part of the dominant tenement, which might have been avoided by making a gap in a fence.

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grant and
reservation.

All easements
extinguished
by unity.

The court appears to have been of opinion to reconcile the passages in *Siderfin* and *Rolle*, upon the ground that the way may be assigned in the first instance in all cases by the person whose grant gives rise to the necessity, and in *Pucker v. Welsted* it was under the grant of the defendant, who retained a land-locked tenement, that the necessity arose.

The rule that a grantor of land to which there is no access, except over other land of his, may in the first instance and once for all assign a reasonable way, would be intelligible enough, because the law only allows any way in such case because there is no other, and it might reasonably be held not to operate if the owner, at the time of the grant, sets out a convenient way, whereas in the case where the way arises by implied reservation, *i. e.* in cases where the grantor retains the land-locked tenement, it would be contrary to this reason to deprive the owner of the land, over which the way of necessity is claimed, of a similar privilege. It may be argued that the authorities are not to be reconciled by the coincidence pointed out in *Pearson v. Spencer*, that in both an opportunity of setting out the way was allowed to the person under whose grant the way was created; the way in one being by implied grant, in the other by implied reservation; but upon the ground that the power which the owner of the way, whether by grant or reservation, has to choose a convenient way, is subject to this, that

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grant and
reservation.

the owner of the land over which it is claimed may, if he does so at once and once for all, set out any convenient way.

All easements
extinguished
by unity. ✓

The point is one which is not likely to arise often, the question generally being whether any way exists, and not as to the direction of it ; but whatever may be decided it is supposed that the rule in Rolfe would, if supported, not be acted on to the extent of its terms, and that if the grantor can assign he must assign a reasonable way and not “*lou il poet melius cco spare.*”]

CHAPTER V.

TITLE TO EASEMENTS BY PRESCRIPTION.



PRESCRIPTION may be defined to be—A title ac- Definition of
quired by possession had during the time and in the Prescription.
manner fixed by law. “*Prescriptio est titulus ex usu
et tempore substantiam capiens ab auctoritate legis*” (*a*).
After the lapse of the requisite period the law adds the
rights of property to that which before was possession
only (*b*).

“ Things corporeal can alone be susceptible of pos- Possession.
session (*c*)—things incorporeal, that is to say, those
‘*quæ in jure consistunt*,’ and not in fact susceptible of
possession, strictly and properly so called ; but they are
susceptible of a quasi possession, ‘*jura non possidentur
sed quasi possidentur*.’ This quasi possession consists
in the enjoyment of the right by him to whom it
belongs. Thus, I am considered to have the quasi
possession of a right of servitude when I do, on the
neighbouring heritage, in the sight and with the know-
ledge of the proprietor of that heritage, those acts which
my right of servitude entitles me to do. This quasi

(*a*) Co. Lit. 113, b.

(*b*) *Usucapio est adjectio domi-
nii per continuationem possessionis
temporis lege definiti.*—L. 3, ff. de
usurp. “ The Roman law relative
to prescription has been adopted
into the law of Normandy, which

prevails in Jersey. We profess to
act on the same principles.” Per
Lord Wynford in the Privy Coun-
cil, 1 Knapp, 69.

(*c*) *Possideri autem possunt quæ
sunt corporalia.*—L. 3, ff. de acq.
poss.

possession is susceptible of the same qualities and defects as possession properly so called”(d).

[87]
Legal posses-
sion.

To constitute a legal possession there must be not only a corporeal detention, or that quasi detention which, according to the nature of the right, is equivalent to it, but there must be also the intention to act as owner(e).

Thus, no legal possession is acquired by a man walking across the land of his friend(f), or using a private way, thinking it to be a public one(g); or unless he would do the act in defiance of opposition(h).

Possession
must be unin-
terrupted.

From the very definition of Prescription, an enjoyment, in order to confer a title, must have been uninterrupted both as to the manner and during the time required by law. It is not to be understood by this expression that the enjoyment of an easement must necessarily be uninterrupted; although, in a great variety of cases, it would obviously be so; as in the case of windows, or rights to water. In those easements which require the repeated acts of man for their enjoyment, as rights of way(i), it would appear to be

(d) Pothier, tom. 4, p. 580. — Traité de la Loi Civile Française.

(e) Apiscimur possessionem corpore et animo, neque per se animo aut per se corpore.—L. 3, § 1, de acq. vel amit. poss.

(f) Qui jure familiaritatis amici fundum ingreditur non videtur possidere, quia non eo animo ingressus est ut possideat, licet corpore in fundo sit.—L. 41. Ibid.

(g) Servitute usus non videtur, nisi is qui suo jure uti se credidit; ideoque si quis pro viâ publicâ vel pro alterius servitute usus sit, nec

interdictum nec actio utiliter competit.—L. 25, ff. quem serv. amit.

(h) Si per fundum tuum nec vi nec clam nec precario commeavit aliquis, non tamen tanquam id suo jure faceret, sed, si prohiberetur, non facturus; inutile est ei interdictum de itinere actuque; nam ut hoc interdictum competat jus fundi possedisse oportet.—L. 7, ff. de itinere actuque privato. [See the judgment in *Dyoc v. Lady James Hay*, 1 Macqueen, S. A. at page 301 of the report.]

(i) Nemo enim tam perpetuo

sufficient if the user is of such a nature, and takes place at such intervals, as to afford an indication to the owner of the servient tenement that a right is claimed against him—an indication that would not be afforded by a mere accidental or occasional exercise(*h*). [88]

The continuity of enjoyment may be broken either by the cessation to use, or by the enjoyment not being had in the proper manner.

“An enjoyment of an easement for one week,” said Baron *Parke*, in the *Monmouthshire Canal Company v. Harford*(*l*), “and a cessation to enjoy it during the next week, and so on alternately, would confer no right”(*m*).

tan continenter ire potest, ut nullo momento possessio ejus interpellari videatur.—L. 11, ff. de serv.

(*h*) Per Curiam in *Bartlett v. Downes*, 3 B. & C. 621.

(*l*) 1 C. M. & R. 631.

[*m*] This does not mean a cessation in the actual user, as, for instance, by reason of the claimant having no occasion to use the easement (otherwise a right to a way or other non-continuous easement could not be acquired); it means a cessation in the user as of right, as in the case cited in the text, where the asking of permission during the period, by admitting that the person asking had no right at that time, interrupted the continuity of the enjoyment as of right. The passage cited in the text has reference to the provisions of Lord Tenterden's Act; in order to make out a right under which, it has been held, that there must be a continuous enjoyment of the right claimed, *as an easement*

(*Onley v. Gardiner*, 4 M. & W. 499), and *as of right*, for the entire period prescribed by the statute; so that if there has been a breach in the continuity of the enjoyment “*as of right*,” as in the *Monmouthshire Canal Company v. Harford*, or “*as an easement*,” as where a unity of possession occurs at any time during the period (*Onley v. Gardiner*), then, although the actual user continues, the continuous user “*as of right*” in the first case, and as “*an easement*” in the second, has been broken, and the case can not be made out under the statute; but in a claim by prescription at the common law, an instance of unity of possession without also unity of ownership would not prevent its establishment; and an instance of asking permission, though almost conclusive evidence against the existence of a right, might possibly be explained, and would not be necessarily fatal to the claim by

So, where the enjoyment has been had under permission asked from time to time, which upon each occasion, amounts to an admission that the asker had then no right. Indeed the very mode in which this enjoyment, under constantly renewed permission, operates in defeating the previous user, is, that it breaks the continuity of the enjoyment (*n*); and it is expressly laid down by the Court of King's Bench, in their judgment in the case of *Tickle v. Brown* (*o*), that the breaking of the continuity is inconsistent with the enjoyment during the periods of either twenty or forty years, and that for that reason evidence of the breaking of such continuity is admissible on a traverse of the enjoyment (*p*).

The interruption here spoken of is that arising from the act of the party claiming the right. The interruption of a right claimed under the statute by any act of the servient owner will be considered hereafter (*q*).

prescription. "If a man have common by prescription, unity of possession of as high and perdurable an estate is an interruption of the right;" Co. Lit, 114 b; see ante, p. 17, note (*e*); and it is in the same sense that "unity of possession" is used by Lord Mansfield in *Morris v. Edgington*, 3 Taunt. p. 30, where he speaks of a right of way or common extinguished by "unity of possession," i. e. unity of ownership; but, under Lord Tenterden's Act, mere unity of actual possession, occurring at any time during the period, is sufficient to prevent a claim from being established under the act, even though the alleged dominant and servient tenements be held

under different landlords. The dictum of *Martin, B.*, in *Winship v. Hudspeth*, 10 Exch. p. 8, that a claim by immemorial prescription at the common law would be defeated by proof of unity of possession at any time, must not be taken as applying to mere unity of possession without unity of ownership also, which did exist in the case itself.]

(*n*) 1 C. M. & R. 631, per Lord Lyndhurst.

(*o*) 4 A. & E. 383; *Beesley v. Clark*, 2 Bing. N. C. 705.

[(*p*) See the cases cited, post, on Lord Tenterden's Act, acc.]

(*q*) Post—Qualities of Enjoyment; [and see the note on Sect. 4, post.]

The mode of acquiring a title to an easement by prescription may be considered with respect—

1st.—To the length of time during which the enjoyment must continue. [89]

2nd.—To the persons against and by whom the enjoyment must be had.

3rd.—To the qualities of that enjoyment.

SECT. 1.—*The Length of Time during which the Enjoyment must be had.*

By the common law an enjoyment to confer a title to an easement must have continued during a period co-extensive with the memory of man; or, in legal phrase, “during time whereof the memory of man runneth not to the contrary.” To this expression a definite meaning was originally attached, as comprising the period elapsed since the year 1189. “Now, ‘time of memory,’” says Blackstone, “has long ago been used and ascertained “by the law to commence from the reign of Richard “the First”(r)—a period adopted by analogy to the stat. 3 Edw. 1, c. 29, which fixed that as the date for alleging seisin in a real action. When the shorter time of sixty years was fixed for a writ of right, and fifty years for a possessory action by 38 Hen. 8, it has been said that a similar extension of the statute was not made by the courts of law, and that the time of prescription for incorporeal rights remained as before (s). It is difficult to see upon what ground this distinction could have been made, as the enacting words of the two statutes are almost identical in expression, and the

Before the
Prescription
Act.

(r) 2 & 3 Will. 4, c. 71, s. 1.

(s) 1st Report of Real Property Commissioners, p 51.

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latter has been considered only as an addition to the former, restricting the period of prescription to sixty years before the action brought, and making no other alteration.

The extreme difficulty of giving proof of enjoyment for so long a period was lessened by its being held that evidence of enjoyment during a shorter time raised a presumption that such enjoyment had existed for the necessary period (*t*)—where, however, the actual origin of the enjoyment was shown to have been of more recent date than the time of prescription, the right in earlier cases was held to be defeated.

Thus, in *Bury v. Pope*(*u*), “It was agreed by all the justices, that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other’s lands, and this house and the lights have continued by the space of thirty or forty years; yet the other may upon his own land and soil lawfully erect a house or other thing against the said lights and windows, and the other can have no action, for it was his folly to build his house so near to the other’s land,—and it was adjudged accordingly.”

This doctrine appears to have been held down to the passing of the Statute of Limitations, 21 Jac. 1, c. 16.

The period of the first year of Richard I. was adopted as the commencement of legal memory by an equitable extension of the statute, which fixed that as the period in which the demandant in a writ of right must have alleged seisin.

“But when, by the Statute of Limitations, 3 Edw. 1,

(*t*) *Jenkins v. Harvey*, 1 Cr. M. & R. 894.

(*u*) Cro. Eliz. 118.

c. 39, the seisin in a writ of right was limited to the time of Richard I., so that none could count of an older seisin, this writ being the highest writ; it was taken to be also within the equity of the statute, that though a man might prove the contrary of a thing of which prescription was made, still this should not destroy the prescription, if the proof were of a thing beyond the time of limitation. For it was reasonable that the inquiry in a prescription should be limited as well as in a writ of right, being lower than that, for it was very hard to put juries to inquire of things so old"(*x*).

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Following out this doctrine, the courts, upon the fixing of a shorter period of limitation in possessory actions, ought to have diminished the length of enjoyment, from which a prescriptive right might be inferred, in all like actions to the period of twenty years, fixed by statute 21 Jac. 1.

The opinion of Mr. Serjeant Williams, supported by high authority, appears to have been—"That *an action on the case*, being a possessory action, was considered by the courts to be in the nature of an ejectment; and as no one can recover in ejectment, unless he or those under whom he claims have been in possession within twenty years, or rather as an adverse uninterrupted possession by another for twenty years is a bar to an ejectment, so an uninterrupted possession of an easement for the same time is considered as a bar to an action on the case, which has for its object, in common with an ejectment, the object of the possession, or at least the dispossessing the defendant of it."—"From the case of *Holcroft v. Heel* it seems necessarily to follow, [92] that where a person has used and enjoyed an easement

(*x*) 2 Roll. Abr. tit. Prescription, 269, pl. 14.

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for twenty years and upwards, though it was a wrongful use at first, he thereby gains such a right, that if he be disturbed in the enjoyment of it, he may maintain an action on the case for a disturbance; and it is no answer to show that the plaintiff originally obtained the use and possession of it by usurpation and wrong" (y).

There appears, therefore, some reason to doubt the correctness of the generally received opinion, that the equitable analogy above mentioned was not extended to the more recent statutes, 32 Hen. 8, and 21 Jac. 1, as well as to the earlier statute of Edw. 1. The only direct authority against this extension appears to be the opinion of Sir R. Brooke, as given in his reading on the statute of 32 Hen. 8, which is not stated to be founded on any decided case, while it is expressly laid down in Brooke's Abridgment, that 32 Hen. 8 "entirely repealed the ancient statute of limitations, and that it extended equally with the former statutes to copyholds as well as to freeholds; for the new statute is, that a man shall not make prescription, title, or claim, &c.; and those who claim by copy make prescription, title, and claim, &c.; also the plaints are in nature and form of a writ of our lord the king at common law, &c.; and those writs which have been brought at common law are ruled by the new limitation, and therefore the plaints of copyhold shall be of the same nature and form" (z).

[93] In the case of *Bury v. Pope*, above cited, which was decided during the period which intervened between the passing of the two statutes of Hen. 8 and Jac. 1, sufficient time had not elapsed to confer a title by the former

(y) 2 Wms. Saund. 175 (n.); Best on Presumptions, p. 103, 2 Notes to Saund. 503. [See note (m).]

(z) Tit. Limitations, pl. 2.

statute, even supposing the equitable analogy to have existed. *Whitton v. Crompton* (a), which appears to be the only case decided expressly upon the statute of 32 Hen. 8, and which is at the most but a doubtful authority, turned upon the point that a *formedon*, having been given since the passing of the statute of Westminster, was not within the 32 Hen. 8, which was but a mere continuation of it; and ultimately the case appears to have been compromised.

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The opinion of Mr. Serjeant Williams is in accordance with the expression of Lord *Mansfield*, "That an incorporeal right, which, if existing, must be in constant use, ought to be decided by analogy to the Statute of Limitations" (b).

"The several statutes of limitations," said *Abbott*, C. J., "being all *in pari materiâ*, ought to receive a uniform construction, notwithstanding any slight variation of phrase, the object and intention being the same" (c).

The view of Serjeant Williams, above cited, is however at variance with the generally received opinions upon this subject; but, although the courts refused in form to shorten the time of legal memory by analogy to the later statutes of limitation, they obviated the inconvenience which must have arisen from allowing long enjoyment to be defeated by showing that it had not had a uniform existence during the whole period required, by introducing a new kind of title-by presumption of a grant made and lost in modern times (d).

Title by grant
made and lost
in modern
times.

(a) 3 Dyer, 278 a.

(b) 2 Evans' Pothier, 136.

(c) *Murray v. E. I. Company*, 5 B. & A. 215; see also *Tolson v. Kaye*, 6 B. Moore, 558, per *Dal-*

las, C. J.

(d) The introduction of this doctrine was attempted by a modern civilian. *Laudensis*, says *Merlin*, p. 82, alleges that though

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And on this ground, although it appeared that a right of way had been extinguished by unity of possession (*e*), or even by an act of parliament (*f*), it has been held that a title might be obtained by an enjoyment for twenty years.

a prescription is not admissible in support of a discontinuous servitude, usage will raise an inference of an actual grant, the existence of which is to be deduced from the patience of the adversary. "C'est bien là," says Merlin, "apprendre aux plaideurs et aux praticiens des chicanes dont ils ne sont que trop enclins à profiter."

(*e*) *Keymer v. Summers*, cited in *Read v. Brookman*, 3 T. R. 157; Bull. N. P. 74.

(*f*) *Campbell v. Wilson*, 3 East. 294; see also *Mayor of Hull v. Horner*, Cowp. 102; *Ildridge v. Knott*, Ibid. 214; *Lady Dartmouth v. Roberts*, 16 East, 331; *Holcroft v. Heel*, 1 Bos. & Pul. 400; *Livett v. Wilson*, 3 Bing. 115; *Doe d. Fenwick v. Reed*, 5 B. & A. 232; *Codling v. Johnson*, 9 B. & C. 933.

[The case of *Campbell v. Wilson*, above referred to, in which it was held that the enjoyment of a way for twenty years was sufficient evidence from which to presume a grant or other lawful origin of a right of way, though an act of parliament had, prior to that enjoyment, extinguished a like right over the same land, so that the twenty years' enjoyment was in fact had by reason of the neglect of the owner of the servient tenement to avail himself of the provisions of the act, is not at variance

with the rule that a man cannot prescribe against a statute (Co. Lit. 115 a), a rule which holds good in the case of easements. The object of the statutory provision (an inclosure act) in the case referred to was simply to benefit the owners of allotted lands, by exempting them from the burthen of existing rights of way, but not to injure the allottees by restricting the power of each allottee to dispose of or burthen his own land as he might think proper; and there was nothing in the statute prohibiting the creation of new rights. And see *Ruce v. Ward*, 7 E. & B. 384. But where the acts of user relied upon are contrary to some statutory provision, so that an actual grant of the right which is sought to be established by user would be void, and it cannot possibly be referred to any legal origin, the common law rule prevails, and no right is acquired. *Rochdale Canal Company v. Radcliffe*, 18 Q. B. 287. In the case of *Mill v. Commissioner in charge of the New Forest*, 18 C. B. 60, a right of common over the lands of the crown in the New Forest was claimed in respect of a piece of land which had formerly been part of the waste of the claimant's manor, but which had been inclosed in the year 1810, and after-

In a recent case, where windows were shown to have existed twenty years, it was held, that proof that they did not exist twenty-two years before the obstruction was insufficient to defeat an action (*g*).

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This was in reality prescription shortened in analogy to the limitation of the 21 Jac. 1, and introduced into the law under a new name, for "the law allows prescription only in supply of the loss of a grant; and therefore every prescription presupposes a grant to have existed" (*h*).

The introduction of this doctrine was attended with considerable opposition; and it was contended, that to sustain a claim founded upon such a lost grant, the jury

wards occupied as a farm. The court held that the user of turning cattle from this farm on to the crown lands from the time of the inclosure down to the time of the claim, conferred no right, by reason that a statute, 9 & 10 Will. 3, c. 36, s. 10, prohibits the creation of any such right in the New Forest. It may occur to the reader that the claimant's predecessors may possibly have had, *before the passing of the statute last referred to*, a right, in respect of the waste lands of the manor, of turning cattle on to the common lands of the crown (in accordance with what was said by Bayley, J., in *The Earl of Sefton v. Court*, 5 B. & C. 921, that a lord of a manor may have a right of turning on cattle on a common, in respect, not only of his cultivated lands but also of his waste lands), and that the user subsequent to the inclosure was

evidence of the existence of such a right in the claimant's predecessors, and that the user was not, therefore, necessarily illegal under the statute. This point, however, did not arise, as the claimant did not satisfy the commissioners who found the facts of the case that any right did exist before 1810, so that the *possibility* of a legal origin for the right claimed was excluded.

The judgments in *Codling v. Johnson* and *The Earl of Sefton v. Court* are both authorities that the mere fact of the tenement in respect of which a claim by prescription at common law is set up, being shown not to have formerly existed in the same state, is not *conclusive* against the claim.]

(*g*) *Penwarden v. Ching*, Moo. & Mal. 400.

(*h*) 2 Black. Com. 265, citing *Potter v. North*, 1 Ventris, 387.

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must actually believe in its existence, as, at all events, they must find it as a fact, though they did not believe it (*i*).

The practical distinction was, that where the claim was by prescription, the length of enjoyment constituted a title; where, on the other hand, the right was claimed by "lost grant," the long enjoyment afforded but a presumption of title; and whether such presumption was conclusive for the purpose for which it was adduced, was a point open to a certain degree of doubt.

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Though the evidence of enjoyment, which has been already adverted to, was in theory presumptive evidence only of prescription, yet it was in practice and effect conclusive (*k*); and it is apprehended, that if a jury had disregarded the recommendation of a judge, "that such evidence warranted the presumption of a grant," the court would have directed a new trial *toties quoties* (*l*).

But, although this principle was clearly recognized in numerous decisions, yet doubts and difficulties still arose from the vague and uncertain language frequently made use of by judges in leaving these questions to the jury—enjoyment being sometimes treated as affording a conclusive presumption—whilst at others such user was only considered to be "cogent evidence" of prescription (*m*), the presumption of which judges were in the habit of recommending juries to adopt.

"It has not unfrequently happened," says a modern writer, "that the same presumption has been spoken of by some judges as a rule of law, whilst by others it has

(*i*) 2 Evans' Pothier, 136.

(*k*) See per Parke, B., in *Bright v. Walker*, 1 C. M. & R. 217.

(*l*) See per Alderson, B., in *Jen-*

kins v. Harvey, 1 C. M. & R. 895.

(*m*) *Rex v. Jolliffe*, 2 B. & C. 54. [See Best on Presumptions, p. 103.]

been treated merely as fit to be recommended to a jury, or as one which a jury might properly make"(*n*).

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This mode of carrying out the policy of the law, by the intervention of a jury, has been strongly objected to. A distinguished writer has observed:—

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“The practice of requiring juries in any case to be mere passive instruments in finding facts upon their oaths, in the existence of which the court itself did not believe, although now established, is of singular origin. The effect is indirectly to establish an artificial presumption, which, for want either of inclination or authority, could not be established and applied directly. It seems very difficult to say why such presumptions should not at once have been established as mere presumptions of law, to be applied to the facts by the courts, without the aid of a jury. That course would certainly have been more simple; and any objection as to the want of authority would apply with equal, if not superior, force to the establishing such presumptions indirectly through the medium of a jury”(*o*).

“Notwithstanding the admission of the presumptions,” says the same learned author, “which appear now to be established and necessary rules of law, this branch of jurisprudence cannot but be considered as imperfect and inartificial, more especially if it be contrasted with the laboured distinctions of the Roman law upon the same subject. The presumption, being one of law, arising out of the fact of continued and adverse possession unrebutted, ought, as a rule of law, to be applied whenever the facts to which it is applicable arise; and yet, unless the jury strain their

(*n*) 1 Phillipps & Arnold on Evidence, 10th edit. 470.

(*o*) 2 Stark. on Evid. 2nd edit. 675.

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grant.
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consciences so far as to find a grant, in the actual existence of which the court itself may not believe, the rule of law is inapplicable ; in other words, the rule is useless, unless the jury, upon the recommendation of the court, find a fact, which, in all human possibility, never existed, and which is perfectly unconnected with the real merits of the case ; surely, so heavy a tax upon the consciences and good sense of juries, which they are called on to incur for the sake of administering substantial justice, ought to be removed by the assistance of the legislature" (p).

The Prescrip-
tion Act.

The stat. 2 & 3 Will. 4, c. 71 (commonly called the Prescription Act), " was intended," said Baron *Parke*, " to accomplish this object, by shortening in effect the period of prescription, and making that possession a bar or title of itself, which was so before only by the intervention of a jury" (q).

This act, however, contains enactments much more extensive than would be necessary for the attainment of this object merely ; and it certainly is to be lamented that its provisions were not more carefully framed, and that a more comprehensive view was not taken of the whole of this most important branch of our law. It deserves to share, in common with too many of our statutes, in the reproach, that it is couched in terms so obscure, and that many of the clauses are so carelessly drawn, that it is extremely difficult to understand what was the intention of the legislature.

The statute has
not superseded
the Common
Law.

It is of the utmost importance to ascertain what the law really was upon the subject of titles by prescription at the time of passing the recent statute, as the statute,

(p) 2 Stark. on Evid. 2nd edit.
669.

(q) *Bright v. Walker*, 1 Cr M.
& Ros. 217.

although it has given some increased facilities to a party claiming an easement, has not superseded the common law, but allowed him an election, to proceed either under the statute or according to the common law, or both. [98]

Nor is the title by lost grant put an end to by the statute any more than that the title by prescription is abrogated by it;* indeed, as far as the preamble may be permitted to afford an indication of the objects of the statute, it would seem that the principal motive for passing the statute was in order to obviate the difficulty which arose from showing the actual commencement of an enjoyment within the time of legal memory.

The statute (2 & 3 Will. 4, c. 71) is as follows:—“*An Preamble. Act for shortening the Time of Prescription in certain*

* “The statute only applies where you want to stand upon thirty years’ user; but here, where the title is one of 200 or 300 years, that statute is not needed, and the title can be rested on the original right before the passing of the statute.” (*Harrick v. Queen’s College, Oxford*, L. R., 6 Ch. 728.) In *Ladyman v. Grace* (L. R., 6 Ch. 764, n.), *Stuart, V.-C.*, held that the statute did not apply to ancient lights, which had become ancient lights by prescription anterior to the passing of the statute. In *Aynsley v. Glover* (L. R., 10 Ch. 283), the plaintiff, whose windows had existed from before 1808, was held to have a title independently of the statute, *Mellish, L. J.*, saying: “The statute has not taken away any of the modes of claiming easements which existed before the statute. Indeed, as it requires the twenty years, the enjoyment during which confers a right, to be twenty years next immediately before some suit or action is brought with respect to the easement, there would be a variety of valuable easements which would be altogether destroyed if a plaintiff was not entitled to resort to the proof which he could have resorted to before the act passed.” Although in these cases a prescriptive right was acquired before the statute, it appears from the observations of *Mellish, L. J.*, in the last case, that a legal grant may be presumed by a twenty years’ continuous user since the statute.

2 & 3 Will. 4,
c. 71.

Claims to right
of common and
other profits à
prendre, not to
be defeated
after thirty
years' enjoy-
ment by show-
ing [only] the
commence-
ment;

99]

cases.—Whereas the expression ‘Time immemorial, or time whereof the memory of man runneth not to the contrary,’ is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice ; for remedy thereof be it enacted, That no claim which may be lawfully made at the common law, by custom, prescription, or grant (*r*), to any right of common or other profit (*s*) or benefit to be taken and enjoyed (*t*) from or upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or of any Ecclesiastical or lay person, or body corporate,* (except such matters and things as are herein specially provided for, and except tithes, rent, and services,) shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only(*u*)

[(*r*) The judgment in *Carlyon v. Loring*, 1 H. & N. 781, shows that the extent of the right claimed by user is not material, if the right could have been legally granted.]

[(*s*) Quære, whether this extends to^s an assignable right to hawk, hunt, fish and fowl. See

Wickham v. Hawker, 7 M. & W. 63.]

[(*t*) The act only affects rights, not duties ; see Williams, J., in *Peter v. Daniel*, 5 C. B. 575.]

(*u*) See *Mill v. The Commissioner in charge of the New Forest*, 18 C. B. 60.

* The first section applies only to cases where one man claims by custom, prescription or grant some profit or benefit to be taken or enjoyed from or upon the land of another, and has no application to a right claimed by a copyholder on his own tenement according to the custom of the manor. (*Hanmer v. Chance*, 11 Jur., N. S. 397; 34 L. J., Ch. 413.)

that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (v).

2 & 3 Will. 4,
c. 71.

after sixty
years' enjoy-
ment the right
to be absolute,
unless had by
consent or
agreement in
writing.

[(v) The provisions of the first section as to profits à prendre differ only from those of the second as to easements, in respect of the length of the periods of user required, and the principles of the decisions on one section are in almost every case applicable to the other.

The statute makes no change in the common law, 1st, as to the nature or extent of the rights which can be claimed as profits à prendre, or as easements; or, 2ndly, as to the requisite qualities of the user by which they can be acquired, viz. that it must be "nec vi nec clam nec precario" (with a single exception noticed below); or, 3rdly, as to the admissibility of facts showing that the enjoyment could not possibly have been as of right, as ex. gr. where it is shown that the right, if any, must have originated at a certain time, when and since which the new acquisition of such right was prohibited by law, either in respect of the lands over which, or the persons by whom the right is claimed; or, 4thly, *in so far as the shorter periods men-*

tioned in both sections are concerned, in the admissibility of any evidence whatever, except mere proof of the time of the origin of the enjoyment, by which a claim at the common law might have been defeated, as, for instance, a license written or parol extending over the whole period, or the absence and ignorance of the persons interested in opposing the claim, and their agents, during the whole period. But in the case of the enjoyment for the longer periods, all such evidence as that included in the 4th head would be excluded, and the claim, if not open to the objections arising under the 1st, 2nd or 3rd heads, would be indefeasible except by proof that the enjoyment was held under a written consent or agreement made or given for the purpose.

The exception above mentioned as to the qualities of the user, introduced by the statute, is that of the case in which a right can be acquired under the act by a precarious user. That is the case of an enjoyment for either of the longer periods under a parol license

2 & 3 Will. 4,
c. 71.

In claims of
right of way or
other easement
the periods to
be twenty
years and
forty years.

“ Sect. 2. And be it further enacted, That no claim which may be lawfully made at the common law, by

extending over the whole period and not renewed during it. In this one, and almost impossible instance, a right may be acquired under the act by an enjoyment which would at the common law have been bad as *precarious*; this is fully explained in the judgment in *Tickle v. Brown*, 4 A. & E. 369, and results from the provisions of sects. 1 and 2, that an enjoyment for the longer periods shall only be defeated by proof of a written license or agreement, which involves the consequence that an enjoyment may, in this instance, be as of right, though permissive, unless the claimant, by asking for permission *during* the period, admits that he then has no right, and so breaks the continuity of the enjoyment for the whole period.

The practical result is, that in the case of the shorter periods, any point whatever which might have been taken at the common law against a claim by prescription or grant, may be taken against a claim under the act, except one, *i.e.* that the right originated within the time of legal memory; and, in case of the longer periods, any objection arising from the nature or extent of the rights claimed, from defects in the quality of the user (except the one already pointed out), or from facts showing that the right claimed,—though not objectionable on either of those grounds, is bad in consequence of some prohibition applicable to the particular case,—may still be taken.

Moreover, the decisions subsequently referred to show that, in order to make out a case under the statute, under either the first or second section, and both as to the longer and shorter periods, the claimant is exposed to certain difficulties which did not exist at common law.

They are as follows:—

1. The user must be proved for the period *computed next before the commencement of the suit* or action in which the claim is contested.

2. An exercise of the right by actual user must be proved to have taken place in the *first* and *last* year of the period, and probably in every year.

3. There must be nothing in the facts inconsistent with the continuous enjoyment of the profit à prendre or easement “*as such*” during the whole period (ex. gr. unity of actual possession at any time during the period would be fatal to any claim under the act, however small the interest of the person exercising the alleged right may have been in the land upon which it was exercised). At the common law, unity of possession was only fatal to a claim by prescription where the possession proved was of an estate equal in duration to the right claimed, whereas under Lord Tentorden’s Act, any unity of actual possession, though the alleged dominant and servient tenements are held under different landlords, is fatal

custom, prescription (*x*), or grant (*y*), to any way or other easement (*z*),* or to any watercourse (*a*), or the

2 & 3 Will. 4,
c. 71.

to the proof of a case under that act.

4. The right acquired is measured by the user, and can be only co-extensive with it; for example, in a claim of common by immemorial prescription, at the common law, the fact that a house obstructing the exercise of the right on its site had stood on the common for two or three years before the suit, would not have prevented the proof of the right to the use of the entire common, including the site of the house; but under Lord Tenterden's Act the right acquired would only be co-extensive with the user, and the site of the house would be excluded. (See *Davies v. Williams*, 16 Q. B. 516, and the dictum of *Cresswell, J.*, in *Moore v. Webb*, 1 C. B., N. S. 676, as to the application of this to easements.) It should seem that the evidence must be that the right has been so used over the whole tract, that, taking into account all the circumstances, including the contiguity of any particular spot to those on which the right is proved to have been exercised and its capacity, the inference may fairly be drawn that the right *was in fact exercised* over the whole tract, including the spot in ques-

tion. See *Peardon v. Underhill*, 16 Q. B. 120, where *Patteson, J.*, is reported to have said that the inference would be that the right (extended) not (*was exercised*) over the whole tract. The judgment of the court in *Davies v. Williams*, in a subsequent part of the same volume, appears, however, to be opposed in this respect to the opinion of that eminent judge.]

[(*x*) Quære, whether a pew is within this section. Sem. not, as the owner of the freehold has no power to grant the use of a pew. See *Best on Presumptions*, p. 100.]

(*y*) See p. 166, note (*r*).

[(*z*) "Only applies to affirmative easements." See per *Parke, B.*, 3 Exch. 557; and the judgments in *Webb v. Bird*, 10 C. B., N. S. 268; 13 C. B., N. S. 841, where the claim was of a right to an uninterrupted flow of air to a windmill; and see the judgment in *Murgatroyd v. Robinson*, 7 E. & B. 391.]

[(*a*) Claim of right to adulterate the water of a natural stream is a claim of a "watercourse" within this section. *Wright v. Williams*, 1 M. & W. 77; *Carlyon v. Lovering*, 1 H. & N. 797.]

* A custom for the inhabitants of a town to hold races over land is not an easement, and cannot be prescribed for under the statute; an easement being a privilege which one neighbour hath in the land of another as appurtenant to his land. (*Mounsey v. Ismay*, 3 H. & C. 486.)

2 & 3 Will. 4,
c. 71.

use of any water (*b*), to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually (*c*) enjoyed by any person claiming right (*d*) thereto without interruption for the full period of twenty years (*e*), shall be defeated or destroyed by showing only (*f*) that

[100] such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which

[(*b*) A claim of right to go upon another man's close, and take water out of a spring there, is an easement. See ante, p. 8.]

[(*c*) The right acquired under the act can only be co-extensive with the actual user, whereas at the common law a larger right might have been inferred. See ante, page 169, and see *Davies v. Williams*, 16 Q. B. 516, and the dictum of *Cresswell, J.*, in *Moore v. Webb*, 1 C. B., N. S. 676.]

[(*d*) Explained fully in *Tickle v. Brown*, 4 A. & E. 369.]

[(*e*) *I.e.* claiming right thereto as an easement and as of right; therefore any occurrence during either the shorter or longer period inconsistent with the *continuous* enjoyment of the easement claimed *as an easement* and *as of right*, is fatal to a claim under this section, as, for instance, unity of possession

(see ante, p. 153, note (*m*)) at any part of the period (*Onley v. Gardiner*, 4 M. & W. 499), or permission asked at any time during the period (*Monmouth Canal Company v. Harford*, 1 Cr. M. & R. 611; *Brasley v. Clarke*, 2 Bing. N. C. 705; per Cur. in *Tickle v. Brown*, 4 A. & E. 383), or an agreement, whether written or verbal, made at any time within the period (per Cur. in *Tickle v. Brown*, ub. sup.), or any other fact showing that at any time during the period the enjoyment could not then have been as of right (*Warburton v. Parke*, 2 H. & N. 64).* All such matters are admissible in evidence upon a simple traverse of the enjoyment as of right and without interruption.]

[(*f*) *Mill v. New Forest Commissioner*, 18 C. B. 60; ante, p. 160.]

* *Gaved v. Martyn*, 19 C. B., N. S. 732.

the same is now liable to be defeated (*g*); and where such way or other matter, as herein last before mentioned, shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing (*h*).

“Sect. 3. And be it further enacted, That when the access and use of light to and for any dwelling house, workshop, or other building, shall have been actually enjoyed therewith (*i*) for the full period of twenty years

Claim to the use of light enjoyed for twenty years indefeasible, unless shown to have been by consent or agreement in writing.

[(*g*) As by proof of the absence and ignorance of the persons interested and their agents during the whole period (per Cur. in *Bright v. Walker*, 1 Cr. M. & R. 219), or by proof of a parol license extending over the whole of the twenty years (*Ib.* and per Cur. in *Tickle v. Brown*, *nb. sup.*; *Beasley v. Clarke*, 2 Bing. N. C. 705); or by proof of any other facts which would rebut the inference of a right by custom, prescription or grant, in a claim at the common law, ex. gr. that during part of the period relied upon the enjoyment was by persons exercising a statutory right, which being put an end to by an alteration in the statute, they still continued the enjoyment for the rest of the period. *Kinloch v. Nerile*, 6 M. & W. 806.

All such facts as these must be specially replied; and having regard to the decision in the last-mentioned case, it would be safer to reply facts showing that the claim is open to any objection such

as those mentioned in head 3, note (*r*), p. 168.

Proof of a parol license extending over the whole of the shorter period is not admissible upon a mere traverse of the enjoyment as of right, the proviso at the end of sect. 2 involving the anomaly that an enjoyment may be “as of right,” though permissive, if the permission be not renewed during the period, although, in the case of twenty years, such license destroys the effect of the user, because at the common law it would have been bad as “precarious.”]

[(*h*) See ante, page 168, in note. If the agreement was made or given at any time *within* the forty years, it would defeat the claim, whether in writing or not, as in that case it would destroy the continuous enjoyment as of right. Per Cur. *Tickle v. Brown*, 4 A. & E. 369.]

(*i*) Per *Mauls*, B., in *Flight v. Thomas*, 11 Ad. & E. 695. “Sect. 2 requires that the easements there mentioned shall have been enjoyed

2 & 3 Will. 4, without interruption, the right thereto shall be deemed
c. 71. — absolute and indefeasible,* any local usage or custom to

by persons 'claiming right thereto;' but in sect. 3, which relates to the access of light there is no such expression, and I think the omission is made purposely;" see per *Tindal, C. J., Mayor of London v. Peniters' Company*, 2 Moo. & Rob. 409; [and this view was adopted by the Court of Exchequer Chamber in *Frewen v. Philipps*, 11 C. B., N. S., 449,† where, in the case of two lessees holding under the same reversioner, *Erle, C. J.*, had held at nisi prius, that the enjoyment by one of the access of light over the premises of the other for twenty years, conferred on the lessee so enjoying the light an absolute right to the light as against that other lessee. The court held that the ruling was right, relying upon the ratio decidendi expressed in another judgment of the Exchequer Chamber

in *Truscott v. Merchant Taylors' Company*, 11 Exch. 855, in which case *Coleridge, J.*, said, p. 863, "In this case the Court of Exchequer gave judgment for the plaintiffs below, without argument, on the authority of *The Salters' Company v. Jay*, 3 Q. B. 109. The only question is whether that case was rightly decided. That depends on the construction of the 3rd section of the Prescription Act, which is addressed merely to the access of light. That section seems to me to simplify and almost new-found the mode of acquiring the right to access of light. It founds it on actual enjoyment for the full period of twenty years, without interruption, unless that enjoyment is shown to have been by consent or agreement expressly made by deed or writing—thus putting the right on a simple

* See the observations of Lord *Westbury, C.*, in *Tapling v. Jones* (11 Lds. 304), as to the right being created by the statute and not founded on a presumed grant or license and the effect of its being absolute and indefeasible (post, Part III. Ch. II. Sect. 3). The statute has not altered the law as to the nature and extent of light to which the owner of the dominant tenement is entitled. (*Kelk v. Pearson*, L. R., 6 Ch. 809.) It has been held by Lord *Hatherley, C.*, that the time during which there is a unity of the possession of the dominant and servient tenements is to be excluded in the computation of the twenty years. The twenty years need not be continuous, they may be partly before and partly after the unity of possession. (*Ladyman v. Grave*, L. R., 6 Ch. 763.) The period of prescription begins as soon as the windows are put in the dominant house, capable of being opened and shut and of admitting light. It is not necessary that the house should be occupied. (*Courtauld v. Legh*, L. R., 4 Ex. 126.)

† *Simper v. Foley*, 2 J. & H. 555.

the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement 2 & 3 Will. 4,
c. 71.

foundation, and with the simplest exception." And *Cresswell*, J., said, "In the course of legislation then and since, parliament has been actuated by a desire to settle titles and rights. One object of the Prescription Act was to shorten the time by which persons who had the access and use of light could acquire an absolute right to it. The 3rd section does not say 'when the access and use of light shall have been enjoyed *as of right*,' because every person has a right to so much light as can come in at his windows. The Prescription Act brought this to a simple question; it says, that after twenty years' enjoyment, without interruption, the right shall be deemed *absolute and indefeasible*." In *Salter's Company v. Jay*, 3 Q. B. 109, and *Truscott v. Merchant Taylors' Company*, in Cam. Seacc. 11 Exch. 855, it had been held that an enjoyment of light for twenty years next before the suit confers an indefeasible right under this section, notwithstanding the local custom of London (confirmed by acts of parliament) that house walls might be raised to any height if upon the ancient foundations;* but if an action for obstructing the light were delayed till after the obstruction had continued for a year, the claimant could not rely upon Lord *Tenterden's* Act, not having enjoyed the light for twenty years

next before the suit. See sect. 4, and the custom would in that case prevail.

In the case of *Harbidge v. Warwick*, 3 Exch. 552, it was held that the owner of a house being tenant and occupier of the adjoining land, enjoyment of the access of light to his house by him for twenty years over that land would not confer a right under the third section, as the access of light must be enjoyed *as an easement*; but the court also laid down, that in a plea in an action of trespass for demolishing an obstruction to a window, a plea of right of light under the statute must state an enjoyment of the light as "of right" for twenty years. This was not necessary to the decision, and cannot be reconciled with the opinions expressed in the cases in the Exchequer Chamber before referred to; but the point decided in *Harbidge v. Warwick*, that a man cannot under such circumstances acquire a right to light under sect. 3, is not touched by these decisions. All that *Frenen v. Philipps* actually decides is, that the rule laid down in *Bright v. Walker*, post, as to cases under sect. 2, that a right to be acquired by an enjoyment for twenty years must be acquired so as to be valid against the owner of the fee, does not apply to rights of light.

In the case of an enjoyment of

2 & 3 Will. 4, expressly made or given for that purpose by deed or
c. 71. writing.*

Before men-
tioned periods
to be deemed
those next be-
fore some suit
wherein a claim
to which such
periods relate
shall be
brought into
question (*h*).

“ Sect. 4. And be it further enacted, That each of the
respective periods of years hereinbefore mentioned shall
be deemed and taken to be the period *next before some
suit or action*(*l*),† wherein the claim or matter to which

light by parol license extending
over the whole of the twenty years,
and not renewed, it is clear that a
right would be gained, as the sec-
tion requires a written consent to
defeat it; and it seems that, even
if the license was asked for and
renewed during the period, the
right would be indefeasible, as the
claimant would only have to prove
actual enjoyment of the light as an
easement, but need not show it to
have been “as of right;” and quære,
whether the same result would not
follow if there was an annual pay-
ment in respect of the license,
unless there was a written agree-
ment. This point was not raised
in the case of the *Plasterers’ Com-
pany v. Parish Clerks’ Company*,
6 Exch. 630, where there had been
an enjoyment of light for twenty
years, and a payment of money
yearly for the use of the light all
through the period of twenty years,
and the origin of the payment was
shown, for the case was so pre-
sented to the court, that it was un-
necessary to give any opinion upon
the question. If the origin of the

payment could not be shown in
such a case, the right might pos-
sibly be allowed, subject to the
payment, as in the case of a pre-
scriptive right, paying so much
yearly. See *Gray’s case*, 5 Rep.
78 b; *Lorelance v. Reynolds*, Cro.
Eliz. 563.]

(*h*) Note the qualification of this
section by sect. 7.

(*l*) A plea of enjoyment for such
period can be supported only by
evidence coming down to the com-
mencement of the suit; *Parker v.
Mitchell*, 11 A. & E. 788; see also
Flight v. Thomas, per Lord Cot-
tenham, 8 Clark & Finnelly, 242.
“The cases prove this, not only that
it is good to lay the right twenty
years before the commencement of
the suit, but that it is bad if it is
not so laid; it is bad if it is laid
next before the injury complained
of.” [See *Wright v. Williams*, 1
M. & W. 77; *Richards v. Fry*, 7
A. & E. 698; *Ward v. Robins*, 15
M. & W. 242, acc. And in order
to support the plea of enjoyment
during the period, actual user
must be proved in the *first* and in

* *Thackeray v. Wood*, 5 B. & S. 325; 6 B. & S. 766.

† An enjoyment next before any action or suit in which the claim is
brought into question confers a right which may be set up in every
subsequent action and suit. (*Cooper v. Hubbuck*, 12 C. B., N. S. 456,
Williams, J., diss.)

such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year (*m*), after the party interrupted (*n*) shall have had or shall have notice thereof, and of the person making or authorizing the same to be made (*o*).*

2 & 3 Will. 4,
c. 71.

the *last* years of the period relied upon. *Parker v. Mitchell*, 11 Ad. & E. 788, shows that actual user during the last year, and *Bailey v. Appleyard*, 8 Ad. & E. 161, and *Curr v. Foster*, 3 Q. B. 581, that actual user during the first year must be proved; and the same points were recognized in *Lowe v. Carpenter*, 6 Exch. 825, where it was also suggested by Parke, B., that an *act* of user in every year of the period should be shown to have taken place, although that opinion is opposed to the suggestion of the court in *Curr v. Foster*, 3 Q. B. 581, that, as to the intermediate period, it would not be necessary to show an act of user in each and every year intervening between the first and last, and that more general evidence of user would suffice.

The act of parliament is so worded, that, though there has been fifty years' enjoyment, that is no defence under the statute unless the enjoyment continues up to the time of the commencement of the suit (per Parke, B., in *Ward v. Robins*, 15 M. & W. 241); and the result of the actual decisions is, that if the action in which the

question is raised be so timed as that no proof can be given of some user in the first and last year of the period next before the commencement of the action, the claim under the act will fail.

It seems impossible to reconcile the dictum of Patteson, J., in *Payne v. Shedden*, 1 M. & Rob. 383, that the use of a way for ten years, and an *agreement* for the next ten to discontinue the user, retaining the right, would be sufficient under the act, with the decisions in the cases last cited.]

(*m*) An uninterrupted enjoyment of more than nineteen years cannot be defeated by an interruption, not acquiesced in, of less than a year. *Flight v. Thomas*, Ex. Ch. 11 Ad. & E. 688; affirmed in House of Lords, 8 Cl. & Fin. 231; [see this case explained by Lord Campbell, 17 Q. B. 272, in *Eaton v. Swansea Waterworks Company*.]

(*n*) Per Parke, B., in *Flight v. Thomas*, 11 A. & E. 699. "Sect. 4 speaks of the *party* interrupted. The statute seems to contemplate interruption of the right, not of the period."

[(*o*) 'To constitute an interrup-

* In *Gale v. Abbot* (8 Jur., N. S. 987), the plaintiff had notice of an obstruction to light and air in January, 1860. After a correspondence *Gale v. Abbot*.

2 & 3 Will. 4,
c. 71. —

In actions on the case the claimant may allege his right generally, as at present.

“ Sect. 5. And be it further enacted, That in all actions upon the case and other pleadings, wherein the party

tion under this section, it is essential that there should be “an actual discontinuance” of the enjoyment in fact, by reason of an obstruction submitted to and acquiesced in for a year (Cam. Scacc., *Plasterers' Company v. Parish Clerks' Company*, 6 Exch. 630); but repeated interruptions in fact, though each too short to operate as “an interruption,” as defined by this section, may yet be sufficient, and are good evidence to show that the user all through was “contentious,” and so not a user “as of right” within the statute. *Eaton v. Swansea Waterworks Company*, 17 Q. B. 267; and see

Rogers v. Taylor, 2 H. & N. 828, where this case does not appear to have been cited; and see *Darvies v. Williams*, 16 Q. B. 558, as to the effect of an interruption by a stranger preventing the acquisition of a right, by preventing proof of user on part of a common, though not destroying the effect of user on other parts of the common. See ante, p. 168, n.; and quære, whether the judgment in the case of *Welcome v. Upton*, 6 M. & W. 536, cited by the court in *Darvies v. Williams*, as turning upon Lord Tenterden's Act, was directed to that act at all ?]

the defendant in October recognized the justice of the plaintiff's complaint, and promised to abate the nuisance. The bill for an injunction was filed in May, 1861. It was held that the prescription was not interrupted, though it would have been had the plaintiff not filed his bill within a year after the defendant had failed to fulfil his promise. “If, after that,” said *Kindersley*, V.-C., “the plaintiff had allowed twelve months to elapse without taking proceedings, even though he had continued to complain, that would have been a submission within the meaning of the 4th section. If that were not so, by continual claims a bill might be filed after ten years.”

Bennison v. Cartwright.

In *Bennison v. Cartwright* (5 B. & S. 1), a right of way over the plaintiff's land had been used since 1812. In October, 1861, the plaintiff built a wall across the right of way. There was a correspondence respecting the interruption, commencing in December, 1861, and ending 23rd February, 1863. On 3rd February, 1863, the defendant knocked down the wall, for which trespass was brought. *Blackburn*, J., left it to the jury whether the defendant had submitted to or acquiesced in the interruption when he was negotiating with the party who had caused it; and they found that the right had not been interrupted for one year. The court held that permission to or acquiescence in the interruption is to be left to the jury, and that it was properly left to them.

Warriek v. Queen's College.

In *Warriek v. Queen's College, Oxford* (L. R., 10 Eq. 128; 6 Ch. 728), a right of common was claimed by all the freeholders of a manor.

claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein, before the passing of this act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof *as of right* (p) by the occupiers of the

2 & 3 Will. 4,
c. 71.

[101]

In pleas to trespass and other pleadings, where party used to allege his claim from time immemorial, the period mentioned in this act may be alleged; and exceptions or other matters be replied specially.

(p) The omission of these words in a plea will make it bad, even after verdict; *Halford v. Hankinson*, 5 Q. B. 584; [and it was in one case laid down that they would be necessary in a plea founded upon the enjoyment of light under s. 3; *Harbidge v. Warwick*, 3

Exch. 552, per *Parke*, B.; but the point was not essential to the decision in that case, and the opinions expressed in the judgments in *Merchant Taylors' Company v. Truscott and Frewen v. Philipps*, ub. sup. p. 172, show that they would not.]

When threatened, some resisted and some gave way. This continued for six years. It was held that there was no interruption acquiesced in, it was simply a dispute which occasioned a suit.

In *Glover v. Coleman* (L. R., 10 C. P. 108), the plaintiff had enjoyed light and air uninterruptedly from 1815 to 1872. In May, 1872, the defendant erected a shed near the plaintiff's window which obstructed her enjoyment. The plaintiff's tenant protested against it, but the action was not brought until July, 1873. Lord *Coleridge*, C. J., directed a verdict for the plaintiff, reserving leave for the defendant to move should the court be of opinion that there was no evidence of the enjoyment of light and air for twenty years next before the commencement of the suit. The court held that the interruption was not acquiesced in for a year, and that there was a constructive enjoyment of the easement for twenty years next before the commencement of the suit.

Glover v. Coleman.

In *Ladyman v. Grave* (L. R., 6 Ch. 768), Lord *Hatherley*, C., held that an interruption by unity of possession was not an interruption in the sense indicated by the statute, which means an adverse interruption. (See also *Carr v. Foster*, 3 Q. B. 587, per *Patteson*, J.)

Ladyman v. Grave.

2 & 3 Will. 4, *tenement in respect whereof the same is claimed* (q) for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the

c. 71.

[(q) The words "the tenement in respect whereof the same is claimed," in this section, have given rise to a question, whether rights of common in gross and other incorporeal rights in gross are within the statute, and can be claimed under it.

The first and second sections expressly extend to "any claim which may lawfully be made, by custom, prescription or grant, at the common law;" and it is beyond all doubt that rights of common in gross and other incorporeal rights in gross may lawfully be claimed at common law. Such rights are equally within the mischief against which the act was directed, and ought not therefore to be held excluded merely because the form of pleading mentioned

in sect. 5 is only appropriate to rights appurtenant. *Parke, B.*, in *Welcome v. Upton*, 5 M. & W. 404, says, "I am not sure that by a liberal construction of the 5th section it might not be made to include them," i. e. rights in gross. But even if it cannot, it does not follow that they are excluded from the act, as the provision of the section is merely that it shall be *sufficient* to plead enjoyment by occupiers. The judgments in *Truscott v. Merchant Taylors' Company* and *Fremmen v. Philipps*, show that the form of pleading directed by sect. 5 does not apply to the case of light; but they turned upon the peculiar language of sect. 3. See also 2 Wms. Saund. 175 h; *Welcome v. Upton*, 6 M. & W. 543.]*

* The question whether a profit à prendre in gross could be prescribed for under the act was considered but not decided in *Bailey v. Stephens*, 12 C. B., N. S. 113, and *Mounsey v. Ismay*, 3 H. & C. 498. In *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687, it was decided that such a right is not within the act. The defendant there claimed that he and his ancestor had for thirty, and sixty years before the action, enjoyed the right of fishing in Coniston Lake, and landing their nets on its banks. The court held the plea bad. They said that the 5th section gave the key to the true construction of the act. It "pro-
fesses to enact forms of pleading applicable to all rights within the
" act theretofore claimed to have existed from time immemorial, which
" forms it declares shall in such cases be sufficient. Those forms have
" clear relation to rights which are appurtenant to land, and to such
" rights only. The whole principle of the pleading assumes a dominant
" tenement, and an enjoyment as of right by the occupiers of it. The
" proof must, of course, follow and support the pleading. It is
" obvious that rights claimed in gross cannot be so pleaded or proved."

name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or (*r*) on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment (*s*), the same shall be

2 & 3 Will. 4,
c. 71.

[(*r*) The disabilities mentioned in sect. 7 fall within this alternative, even if they are excluded from the first branch of the alternative by the use of the word "hereinbefore."]

[(*s*) This means any matter of fact or law not inconsistent with the simple fact of enjoyment as required by the statute, i. e. a continuous enjoyment as of right (*Tickle v. Brown*, 4 A. & E. 382), and as an easement (*Onley v. Gardiner*, 4 M. & W. 500), and, consequently, any fact inconsistent with the former, such as permission asked at any time during the period (*Tickle v. Brown*, *ib. sup.*; *Beasley v. Clarke*, 2 Bing. N. C. 708), or with the latter, such as unity of actual possession at any time during the period, or such a state of the ownership of the alleged dominant and servient tenement as that there could not be an enjoyment as of right, as in *Warburton v. Parke*, 2 H. & N. 64, where, during part of the period, the reversioner of the tenants exercising the alleged right was tenant for life of the land over which it was exercised, may be proved upon a mere traverse of the enjoyment.

But anything not inconsistent with such enjoyment, as ex. gr. a

license extending over the whole period (*Tickle v. Brown*, *ib. sup.*; and see ante, p. 168, note); a tenancy for life or other of the disabilities included in sect. 7 (*Pye v. Mumford*, 11 Q. B. 666); such facts as that during the first part of the period of enjoyment, the user was by virtue of the provisions of an act of parliament, but was continued after they had ceased to be in force, and that there had been no right in existence before the act (*Kinloch v. Nerile*, 6 M. & W. 795). cannot be given in evidence upon a traverse of a plea under the statute, but must be specially replied.

The difficulties to which a plaintiff was formerly exposed upon questions of this kind, are removed by the alterations in the law of pleading by the Common Law Procedure Act, 1852, allowing plaintiffs to reply double, and so to traverse the enjoyment as of right, and also to reply any matters as to which it may be doubtful whether they would be included in such traverse; they never can arise in cases where the question is raised upon a traverse of a right alleged in general terms, as in the case of a declaration alleging a right to an easement by reason of the possession of a tenement; in

2 & 3 Will. 4, specially alleged and set forth in answer to the allegation
 c. 71. of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

No presumption to be allowed from shorter periods than are herein mentioned as applicable.

“ Sect. 6. And be it further enacted, That in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim (t).*

[102]
 Proviso for disabilities.

“ Sect. 7. Provided also, That the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall

such cases, the defendant may take every possible objection under the act upon a mere traverse of the right so alleged; see chapter on Pleading, post.]

M. & R. 217; [*Patteson*, J., in *Carr v. Foster*; *Parke*, B., in *Lowe v. Carpenter*, ub. sup. p. 175; Best on Presumptions, 127, note (v).]

(t) See *Bright v. Walker*, 1 C.

* On a plea of an immemorial right of way there must be evidence of user for at least twenty years as of right, though it need not be the twenty years next before the commencement of the suit. Ancient user and modern non-user are to be weighed together by the jury. Modern non-user may be used to show that ancient user was not of right. (*Darling v. Clue*, 4 F. & F. 329.) User for a less period than the prescribed number of years is not wholly inoperative; it may, in conjunction with other circumstances, bear its natural weight as evidence of a grant. Thus, taking vitreous sand from copyhold tenements by copyholders for less than thirty years, coupled with evidence of taking other sand from the copyhold for more than thirty years, was held to prove an immemorial custom to take sand generally. (*Hanmer v. Chance*, 11 Jur., N. S. 397; 34 L. J., Ch. 413.)

have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible (u). 2 & 3 Will. 4,
c. 71.

“Sect. 8. Provided always, and be it further enacted, That when any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be

Time excluded in computing the term of forty years appointed by this act in favour of the reversioner of the servient tenement.

(u) Sect. 7 must be read with sect. 4, and the period of any tenancy for life must be excluded, [if properly pleaded,] in the computation of the periods of thirty years; *Clayton v. Corby*, 2 Gale & D. 182; [2 Q. B. 813, S. C.; *Pye v. Mumford*, 11 Q. B. 666. It appears from the judgments in these cases, that if the tenancy for life be replied to a plea of enjoyment under the act, the defendant may show, by way of rejoinder, that he has had an enjoyment for the required period, excluding the time of that tenancy, such period being “constructively” next before the suit; but that if the plaintiff does not reply the tenancy, but

simply traverses the enjoyment, the case will be determined as if there had been no tenancy for life at all. By both traversing the enjoyment and replying the tenancy for life, the defendant will be driven to show an enjoyment during the tenancy for life, and also for thirty years independently of it. See also the observations of Parke, B., in *Onley v. Gardiner*, as to the effect of excluding the period, being in effect to increase the total required period of enjoyment, and not simply to connect two discontinuous periods absolutely excluding the time of disability.]

2 & 3 Will. 4, resisted by any person entitled to any reversion expectant
c. 71. on the determination thereof (*x*).

Not to extend
to Scotland.

“Sect. 9. And be it further enacted, That this act shall not extend to Scotland.” *

Effect of the
Prescription
Act.

[103]

With the exception of the right to light, two distinct periods of user with respect to easements are specified by the recent Prescription Act. As far as concerns the shorter period fixed—an enjoyment for twenty years—the statute seems to be merely a declaration in accordance with the law as it before stood (*y*), it enacted only that the right should not be defeated by showing the commencement of such user to have been within the time of legal memory; but allowing such user to be defeated in any other way by which its effect might previously have been destroyed.

[*(x)*] The judges of the Court of Queen’s Bench laid down in the case of *Palk v. Shinner*, 18 Q. B. 568, that the 8th section applies only to the period of forty years, and therefore that the time during which the premises are under lease for a term exceeding three years are not to be excluded in the computation of the period of twenty years’ enjoyment of a right of way; but the question whether the tenancy for years, though *not to be absolutely excluded* under sect. 8, might not be made use of in another way to defeat the user, is quite a different matter. See

post, p. 197, note.]

[*(y)*] Vide ante, p. 160. [In *Palk v. Shinner*, ub. sup., *Erle, J.*, said, “the statute makes no difference in the modes of defeating the user, except as it provides that it shall not be defeated by proof of origin at some time prior to the twenty years;” but the proposition in the text must be taken with some qualification, in consequence of the provisions of sect. 4, and the decisions thereupon, the effect of which is to expose the claimant to some difficulties first introduced by the act, and mentioned ante, p. 167, note.]

* By 21 & 22 Vict. c. 42, the act is extended to Ireland from and after the 1st January, 1859; and by 37 & 38 Vict. c. 35 (the Statute Law Revision Act, 1874), the words “or Ireland” are struck out of sect. 9; and sect. 10, which enacts that the act shall commence and take effect on the first day of Michaelmas Term then next ensuing; and sect. 11, which allows it to be amended during the session, are repealed.

The enactment as to the longer period of forty years materially restricts the common law modes of defeating the effect of user of an easement, declaring that user for that time shall give an absolute and indefeasible right (*z*), notwithstanding any personal disability on the part of the owner of the servient inheritance (*a*), unless it shall appear that the same was enjoyed under some consent or agreement by deed or writing.

Effect of the
Prescription
Act.

In all cases in which an easement is claimed under the statute by user, such user must be shown to have existed during the requisite periods immediately preceding the commencement of some suit or action wherein the claim or matter to which such period may relate shall come in question (*b*).

Where, however, the servient tenement, upon, over, or from which any such way, or other convenient water-course, or use of water, shall have been or shall be claimed or derived, has been held during the whole or any part of the forty years, "under any term of life or any term of years exceeding three years from the granting thereof," "the time of the enjoyment during the continuance of such term shall be excluded in the computation," provided that the claim to the easement founded on the user shall be resisted by the reversioner within three years after the determination of such term (*c*).

Exception for
disabilities.

[104]

The peculiar language of this section (s. 8) must be observed. It is not in terms extended to every descrip-

(*z*) Sect. 2.

(*a*) Sect. 7.

(*b*) Sect. 4; see page 174, ante, note (*d*).

(*c*) *Wright v. Williams*, 1 M.

& W. 77; *Onley v. Gardiner*, 4 M. & W. 496; *Richards v. Fry*, 7 A. & E. 698; *Jones v. Price*, 3 Bing. N. C. 52; 3 Scott, 376.

Exception for disabilities. tion of easement as in the 2nd section, but is confined “to a way or other convenient watercourse or use of water.” “No doubt,” said *Parke, B.*, in *Wright v. Williams* (*d*) “there is a mistake in the 8th section, probably a miscopying in the insertion of the word ‘convenient,’ instead of ‘easement.’” If the word easement were substituted, as suggested by the learned judge, the language of the two sections would be identical.

No case has yet arisen in which the courts have been called upon to decide whether effect could be given to the presumed intention of the legislature, or whether the exemption must be strictly confined to the two kinds of easement mentioned in the statute (*e*). It may, however, be suggested, that by reading “convenience” instead of “convenient,” a word which in the old books is synonymous with easement, the language would be sufficient to give effect to the intentions of the framers of the statute, without any violent perversion of the words.

[105] After an enjoyment of forty years, the extent of the exemption contained in the 8th section appears to amount to this:—The period during which the owner of the servient inheritance has not been “*valens agere*,” in consequence of the existence of a lease for life or for more than three years, is altogether excluded in the computation of the time during which the user has been enjoyed, provided he contests the claim within three years after the lease expires; so that if the first twenty of the forty years’ user were had at a time when the

(*d*) 1 M. & W. 77.

stat. 9 Geo. 4, c. 14, s. 6; and

(*e*) See *Lyde v. Barnard*, 1 M. & W. 101, observations of the judges upon the word “upon,” in

Wright v. Williams, 1 M. & W. 77.

servient tenement was not so held under lease, the owner of such tenement would be barred, even though he brought his action within the three years from the expiration of the lease: and it would also seem that for the same reason he would equally be barred, though the tenement had been held during the first eighteen and the last two years of the forty without lease, the tenement being held on lease during the intervening period of twenty years; the time of user during the leases is simply to be excluded, and there appears to be nothing to prevent the tacking together of the two periods of eighteen and two years, during which there has been a valid user. This point, it is true, has not yet arisen; but the case appears to be exempted from the rule requiring twenty years' enjoyment next before action brought, by the express enactment of the statute—that the time during which the property was so held on lease shall be excluded from the computation of the period of forty years (f).

Exception for disabilities.

Supposing, then, that the period during which the servient tenement has been so in lease is simply to be excluded in the computation of the time, and to be considered in law as though it had never been, a further question arises, whether the user, during the remaining twenty years, when there was no such demise, can be

[106]

[(f) The views of the learned author are confirmed by the judgments of the Court of Queen's Bench in *Clayton v. Corby*, 2 Q. B. 813, and of *Pye v. Mumford*, 11 Q. B. 675, upon the effect of excluding the periods of disability under sect. 7; they are excluded for the benefit of the person resisting the claim, and not of the person setting it up; if, therefore,

there has in fact been an interruption by the tenant for life or other occurrence during the tenancy affecting the enjoyment, this may be shown, in order to defeat the claim, and the claimant could not get rid of the objection by saying that the tenancy was to be excluded in his favour, so as to shut out such objection.

Exception for disabilities.

defeated as in ordinary cases ; for instance, by showing that the owner of the inheritance was during the whole or part of that time under a disability. By the 7th section, the provision in favour of disabilities does not apply to the cases “where the right or claim is declared to be absolute and indefeasible ;” and it may be urged, that the policy of the law is, after so long an enjoyment, to clothe such user with the legal right without allowing the general object to be defeated by too minute provisions. To this, however, it may be replied, that if the period of the subsistence of the lease is to be excluded, the reversioner does not obtain complete protection unless he stands in the same position to all intents and purposes as he would do in the ordinary case of an user of twenty years, when the servient tenement was not under lease ; and the words of the 7th section of the statute may be satisfied by supposing it to mean only, that, in the computation of the period of forty years, for the purpose of throwing upon the owner of the inheritance the onus of showing that he was under the particular disability of a reversioner, no time of general disability is to be deducted ; but that the fact of his being a reversioner being once established, and the question, therefore, then being, whether there has been a valid user of twenty years, that must be decided as if it stood completely abstracted from the time during

[107] which the servient tenement was in lease ; or that, in other words, in computing the period of forty years, disability [under s. 7] shall never be deducted—in computing that of twenty years, always [if properly set up in the pleading (g).]

[(g) The judgments in *Clayton v. Corby* and *Pye v. Mumford*, (ante, p. 181) fully establish the propositions contended for by the

With regard to light, by the 3rd section, twenty years' Light. uninterrupted enjoyment [of the access of it "*as an easement*" (*h*)] confers an absolute and indefeasible right, with the single exception of the case in which such enjoyment was had under written agreement. The 8th section of the statute does not in terms apply to the easement of light, and the only period of time there mentioned is "forty years," so that, even supposing the courts should hold that section to apply to easements in general, it would still be a question whether light could be included in it. This would depend upon whether the expression—period of forty years—could be taken to be synonymous with the period in which these rights became absolute, subject to the proviso contained in that section (*i*).

By the construction given to the clause (sect. 4) of the statute, enacting "that no act or matter shall be deemed to be an interruption within the meaning of the

learned author. There are in short two distinct modes of making out a right to an easement under the 2nd section, one by twenty years' user and another by forty years' user. If the twenty years' user be pleaded, and a tenancy for life be replied, it is competent for the claimant, by sect. 7, to rejoin and prove a twenty years' user (excluding the time of the tenancy for life), and if he do not he will fail. If the forty years' user be set up, and a tenancy for life or for years be replied, the claimant is driven, by sect. 8, to rejoin and prove a forty years' user, excluding those periods; but whether the claimant relies upon a twenty years' user by reason of his not

having in fact had a user for forty years, or by reason that the provisions of sect. 8 furnish an answer to his forty years' user, is quite immaterial, and the question whether there has been a good twenty years' user in the one case constructively, in the other actually, next before the suit, must be decided in each case according to the same rules.]

[(*h*) *Harbidge v. Warnick*, 3 Exch. 552.]

[(*i*) In *Palk v. Shinner*, post, p. 197, the judges were clearly of opinion that sect. 8 only applies to the period of forty years, see post, p. 197; but whether or no, light is not within sect. 8, see the cases, p. 172.]

Light.

statute, unless the same shall be submitted to or acquiesced in for one year after the party shall have had or shall have notice thereof," an enjoyment for the full period, minus any time less than a year, has been construed to give a right (*k*).

No title given
by enjoyment
during shorter
time.

An opinion seems, on one occasion, to have been expressed, that, before the statute, a license might be presumed from a length of user insufficient to raise the presumption of a grant, so as to justify the exercise of an affirmative easement until such license was countermanded (*l*). That such user shall be altogether insufficient to give a right is provided by the section which enacts, That no presumption shall be made in favour of any claim from the exercise or enjoyment of the thing claimed during a shorter period than that specified by the statute (*m*).

Inter præsentes et absentes.

The period of prescription fixed by the civil law was ten years where the party sought to be charged was present, and twenty where he was absent.

[108]
Code Civil.

By the French Code Civil thirty years' user is sufficient to confer a title to all those easements which are, from their nature, susceptible of being claimed by prescription (*n*).

(*k*) *Flight v. Thomas*, in the House of Lords, 8 Cl. & Fin. 231.

(*l*) *Doe d. Foley v. Wilson*, 11 East, 56.

(*m*) Sect. 6. [See the observations of *Patteson, J.*, in *Curr v.*

Foster, and *Parke, B.*, in *Low v. Carpenter*, cited ante, p. 175, and Best on Presumptions, p. 127.]

(*n*) Pardessus, *Traité des Servitudes*, 424.

SECT. 2.—*The Persons against and by whom the
Enjoyment must be had.*

As it is essential to the existence of an easement, that one tenement should be made subject to the convenience of another, and as the right to the easement can exist only in respect of such tenement, the continued user by which the easement is to be acquired must be by a person in possession of the dominant tenement: and as such user is only evidence of a previous grant—and as the right claimed is in its nature not one of a temporary kind, but one which permanently affects the rights of property in the servient tenement—it follows that such grant can only have been legally made by a party capable of imposing such a permanent burthen upon the property—that is, the owner of an estate of inheritance (*o*); and therefore, in order that such user may confer an easement, the owner of the servient inheritance must have known that the easement was enjoyed, and also have been in a situation to interfere with and obstruct its exercise, had he been so disposed; his abstaining from interference will then be construed as an acquiescence (*p*). *Contra non valentem agere non currit præscriptio.*

Persons
against whom
enjoyment is
valid.

The want of acquiescence of the owner of the inheritance of the neighbouring tenement may, it should seem, be inferred, either from the circumstance, that he is not in possession, or from the nature of the enjoyment of the right, it being, in truth and in fact, out of the view and knowledge of such neighbouring owner, though he be in possession. With respect to the former question an important point arises, whether, if the

Acquiescence
of owner of
inheritance
required.

[109]

(*o*) *Daniel v. North*, 11 East, 372.

(*p*) *Gray v. Bond*, 2 Brod. & Bing. 667; 5 J. B. Moo. 527.

Persons
against whom
enjoyment is
valid.

knowledge in fact of the owner of the inheritance of the hostile enjoyment of an easement be shown, he is bound by it. And this is a question which seems to be unsettled by the Prescription Act, at all events except in cases within the 8th clause. Cases decided before that act certainly lay down, that if knowledge in fact of the reversioner be shown, he would be bound; but in one of the cases a learned judge (*q*) took a distinction between two divisions of easements, expressing an opinion to the effect, that an enjoyment of a negative easement would not bind the reversioner, unless his knowledge were positively shown, though it would be otherwise of an affirmative easement.*

If, then, it be taken as law, that a reversioner can be bound by his knowledge in fact of an user enjoyed during the time his land is in the possession of a tenant, as his acquiescence in such cases is inferred from his offering no opposition, it would seem that he must have, by law, some valid mode of preventing the right from vesting by the continuance of the user. With respect to a negative easement it is clear the exercise of such a right gives no right of action to any person; and even as to some positive easements, such as a right of way,

[110] it is doubtful whether the reversioner could maintain an action (*r*); and, during the continuance of the tenancy

(*q*) Per *Le Blanc*, J., in *Daniel v. North*, 11 East, 372; and semble also by *Park*, J., in *Gray v. Bond*, 2 B. & B. 667; 5 J. B. Moo. 535.

[(*r*) "In order to maintain the action it was necessary for him to aver and prove that the act com-

plained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious. A simple trespass, even accompanied by a claim of right, is not necessarily injurious to his

* See *Pryor v. Pryor*, 7 W. N. 111, 133; 26 L. T., N. S. 758; 27 L. T., N. S. 257.

he may be unable either to interrupt the enjoyment, or to compel his tenant to do so ; unless, therefore, some

Persons
against whom
enjoyment is
valid.

reversionary interest." Per *Parke, J., Baxter v. Taylor*, 4 B. & Ad. 76. This case was acted upon in *Simpson v. Sarage*, 1 C. B., N. S. 352, in which the court held that no action lies by a reversioner, for a smoke nuisance caused by lighting fires in a factory and causing smoke to issue, so as to be a nuisance to the reversioner's tenants and make them give notice to quit; and a very similar point was decided in *Mumford v. Oxford, Worcester and Wolverhampton Railway Company*, 1 H. & N. 34, where the complaint was for causing loud noises, and the court held that the action would not lie. It would be foreign to the subject of this book to discuss the question how far these cases can be reconciled with the old authorities referred to by the court in *Bell v. Midland Railway Company*, 10 C. B., N. S. 287, as to the right of action for causing tenants to leave their tenements. In both cases the court relied upon the fact that the injury complained of was not of a permanent character, although unquestionably the repetition of such acts would furnish evidence against the reversioner, whether he might be able to rebut it or not. In *Kidgill v. Moor*, 9 C. B. 372, *Maule, J.*, referring to the dictum of *Parke, B.*, in *Baxter v. Taylor*, says, "My brother *Parke* does not say that it would not be evidence if the party claimed a right of way and meant to assert it;" and in *Tickle v. Brown*, 4

A. & E. 378, *Patteson, J.*, said, "before the statute the acts of the tenants would have been evidence against the reversioner, though their declarations were not so." In *Palk v. Skinner*, 18 Q. B. 575, where, there being a user of twenty years, during the first fifteen years of which the premises were under lease, *Erle, J.*, said, if this case had arisen before the statute, there would have been good evidence to go to the jury, notwithstanding the existence of the tenancy, and the question is still to be left to the jury in the same way; and see the judgments in *Daniel v. North*, 11 East, 372, and *Linehan v. Deble*, 9 Ir. C. L. R. 305.

It seems unjust to deprive the reversioner of an immediate remedy in respect of acts which may at a future time furnish evidence against him, and which though he may possibly in many cases be able then to rebut, must in all cases involve him in trouble and expense, by affecting the evidence of his right. The point is akin to that which is raised in actions by reversioners for obstructions by others to the enjoyment of easements by their tenants, the ground of which action is, that the evidence of the right of the reversioner to the easement is affected, as his acquiescence in the obstruction would furnish evidence against him of a renunciation and abandonment of it. See per *Tindal, C. J.*, *Bower v. Hill*, 1 Bing. N. C. 549.

Persons
against whom
enjoyment is
valid.

Effect of notice
by reversioner.

positive act, as a notice, intimating his dissent, be sufficient to obviate the effect of the user giving a right, he would not be brought into the condition of a *valens agere*, without which the prescription ought not to run against him.

Bracton, treating of the qualities of a possession necessary to confer a right, appears to consider that such notices, at all events, if followed up by an action as soon as the party is in a condition to bring one, will amount to an interruption.

“Continuam dico ita quod non sit interrupta; inter-

In *Kidgill v. Moor*, 9 C. B. 364, the plaintiff sued for the locking of a gate across a way to which the tenants of the plaintiffs were entitled in respect of the tenement of which he was reversioner, and it was objected, on motion in arrest of judgment, that the act complained of was not of a permanent character; but the court held that the declaration was good, as such an act *might* operate as an injury to the reversionary interest, and that the question whether the plaintiff is injured in his reversionary estate is one of fact for the jury. *Maule, J.*, said, “I cannot doubt that there may be such a locking and chaining of a gate as would amount to as permanent an injury to the plaintiff’s reversionary interest as the building of a wall; and the allegation that the plaintiff was injured in his reversionary interest is an allegation of matter of fact * * * which is for the jury to find according to the evidence.” And in *The Metropolitan Association v. Petch*, 5

C. B., N. S. 504, a declaration in an action by a reversioner for obstructing ancient lights by the erection of a hoarding, was sustained, the court holding that such an erection might be an injury to the reversion, and that it was for the jury to determine. In that case also the judges lay down that the way in which the act might injure the reversioner would be by *affording evidence in denial of the right*. According to the last class of cases, the jury might find for plaintiff if the act complained of would furnish any evidence in denial of the right. It is difficult to discover any principle upon which the reversioner should be without remedy by action in respect of a series of separate acts of obstruction furnishing evidence in denial of the right, while he has such action in the case of the wooden hoarding intervening, or why a series of trespasses in the assertion of a right of way should not give a right of action to a reversioner.]

rumpi enim poterit multis modis sine violentiâ adhibitâ, per denuntiationem et impetrationem diligentem, et diligentem prosecutionem, et per talem interruptionem, nunquam acquireret possidens ex tempore liberum tenementum" (s).

Persons
against whom
enjoyment is
valid.

And in speaking of this precise case—of a particular estate existing in the servient tenement during the user of the easement—he seems to be clearly of opinion that such a prohibition will be sufficient to preserve his right.

"Si autem fuerit scisina clandestina, scilicet in absentia dominorum vel illis ignorantibus, et si scirent essent prohibitori, licet hoc fiat de consensu vel dissimulatione ballivorum, valere non debet" (t).

In the case of *Arkwright v. Gell* (u), great stress was laid by the court upon the difficulty, on the part of the servient owner, of resisting the enjoyment.

"But though," says Mr. Serjeant Williams, "an [111] uninterrupted possession for twenty years or upwards should be sufficient evidence to be left to a jury to presume a grant; yet the rule must ever be taken with this qualification, that the possession was with the acquiescence of him who was seised of an estate *of inheritance*. For if a tenant for term of years, or life, permits another to enjoy an easement on his estate for twenty years or upwards, without interruption, and then the particular estate determines, such user will not affect him who has the inheritance in reversion or remainder; but when it vests in possession he may dispute the right to the easement, and the length of possession will be no answer to his claim. Thus, where

(s) Lib. 2, f. 51 b.

(t) Lib. 4, f. 221.

(u) 5 M. & W. 203.

Persons
against whom
enjoyment is
valid.

A. being tenant for life, with a power to make a jointure, which he afterwards executed, gave license to B. in 1747, to erect a wear on the river T. in A.'s soil, for the purpose of watering B.'s meadows, and then A. died, and the jointress entered and continued seised down to the year 1799, when the tenant of A.'s farm diverted the water of the river from the wear; upon which the tenant of B.'s farm brought an action on the case for diverting the water; it was held by the court of K. B. that the uninterrupted possession of the wear for so many years, with acquiescence of the particular tenants for life, did not affect him who had the inheritance in reversion; but as the court entertained some doubt of the fact of the license, and as the verdict for the plaintiff would not conclude the rights of the parties, they did not think it right to disturb the verdict: but the court was of opinion upon the point of *law* as above stated" (x).

[112] In *Daniel v. North* (y), which was an action for obstructing ancient lights, it appeared that the premises on which the obstruction was erected had been occupied, during twenty years, by a tenant at will, and there was no evidence that the owner of those premises was aware of such enjoyment.

Lord *Ellenborough* observed, on the argument for a new trial, "How can such a presumption be raised against the landlord, without showing that he knew of the fact when he was not in possession, and received no immediate injury from it at the time?" In delivering his judgment his Lordship said, "The foundation of

(x) 2 Wms. Saund. 175 e. ; 2 Notes to Saund. 509. [Nota, it did not appear that there had been any user *except* in the time of the particular tenant.]
(y) 11 East, 372.

presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against a party capable of making the grant; and that cannot be presumed against him, unless there were some probable means of his knowing what was done against him; and it cannot be laid down as a rule of law, that the enjoyment of the plaintiff's windows during the occupation of the opposite premises by a tenant, though for twenty years, without the knowledge of the landlord, will bind the latter, and there is no evidence stated in the report from whence his knowledge should be presumed."

Persons
against whom
enjoyment is
valid.

So in *Barker v. Richardson* (z), where lights had been enjoyed for more than twenty years contiguous to land which, within that period, had been glebe land, but was conveyed to a purchaser under the statute 55 Geo. 3, c. 144, it was held that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could [113.] be presumed.

The cases above cited were decided before the passing of the recent statute 2 & 3 Will. 4, c. 71, and it is important to observe, that the law with regard to the easement of window lights under that statute stands upon an entirely different footing from that applicable to all other easements; at all events, with regard to its acquisition.

Persons bound
by the statute.

By the statute, twenty years' enjoyment of the access of light to a house or building, without interruption, confers an absolute and indefeasible right, unless such

(z) 4 B. & A. 579; see also *Runcorn v. Doe* dem. *Cooper*, 5 B. & C. 696; 8 Dowl. & R. 450.

Persons
against whom
enjoyment is
valid.

user was had under some written agreement. No provision appears to be made for the circumstance of the premises, upon which the restriction is to be imposed, having been during the whole or any part of the time in the possession of a tenant—for the ignorance or acquiescence of the landlord—or even for cases in which it may have been absolutely impossible for him to have interfered at any time during the twenty years.

The cases, therefore, of ancient windows above cited are [not] now of application, [except in cases where by reason of the claimant not suing in time, he is driven to rely on the common law right, having regard to the decisions upon sect. 3, cited ante, p. 171, note (i)]; but as the statute does not appear to have made any material alteration in the law as applicable to the user of other easements for a period of twenty years, these decisions are at all events authorities in the case of all those rights to which, before the passing of the statute, the law of light was analogous (a).

“During the period of a tenancy for life, the exercise of an easement will not affect the fee. In order to do that, there must have been that period of enjoyment against the owner of the fee” (b).

(a) See *Wall v. Nixon*, 3 Smith, 316. [The statute does not apply to any negative easement except light; the law as to those other rights cannot therefore be affected by it.]

(b) Per Curiam in *Bright v. Walker*, 1 C., M. & R. 222; [but this does not apply to light (see *Iremen v. Philips*, ante, p. 172, note); and in the case of other easements, if the reversioner does not reply the existence of the te-

nancy for life to a plea of enjoyment under the act, the fee will be bound by the enjoyment under and against the tenant for life. This point could not arise in *Bright v. Walker*, where the point was not raised on a traverse of a plea under the statute, but upon a traverse of a declaration alleging a right in general terms, under which traverse every possible objection was open.]

With regard to all [affirmative] easements, the law as to the servient tenement not being in the possession of the owner of the inheritance, where knowledge in fact on his part can be shown, would appear to be the same as before the statute. But where the servient tenement "upon, over, or from which any way, or other convenient watercourse, or use of water," is claimed, has been held under any term of years exceeding three years from the granting thereof, the user during the continuance of such term is excluded in the computation of the period of forty years (c), provided the owner asserts his rights within three years after the expiration of the term (d).

Persons
against whom
enjoyment is
valid.

[114]

(c) Both of the period of twenty and forty years. Per Cur. in *Bright v. Walker*, 1 C., M. & R. 211. [But the judges in B. R. in *Palk v. Shinner*, were clearly of opinion that the forty years' period only is affected by sect. 8, and *Erle, J.*, said, "The 8th section applies expressly to the computation of an enjoyment for forty years; it would be contrary to all the rules of construction to hold that it applies also to the computation of an enjoyment for twenty years. The only possible ground for such a conclusion is found in *Bright v. Walker*. But there the question was as to the exclusion of a tenancy for life, and the court was clearly right in holding that such a tenancy must be excluded from the computation of twenty years' enjoyment. It is so excluded under sect. 7, and I do not see that its exclusion is made more clear by sect. 8; I do not think the learned judge ever meant to

say that a tenancy for years must be excluded from the computation of an enjoyment for twenty years."]

[(d) In *Palk v. Shinner*, 18 Q. B. 575, a way had been used for twenty years, during the first fifteen of which the servient tenement had been under lease, and it did not appear whether the reversioner knew of the user during the lease, but at all events no resistance was made either during the fifteen years or the remaining years for which the land was in possession of the reversioner. *Erle, J.*, told the jury that the fact of the land having been in lease for the fifteen years would not defeat the user, and upon a rule nisi for a new trial, for misdirection, the question principally argued was whether the 8th section of the statute applied to a twenty years' user, so that the tenancy should be "excluded," and the court expressed a clear opinion that it did not; but *Erle*,

Persons
against whom
enjoyment is
valid.

In *Bright v. Walker (e)*, where an action was by one lessee of the Bishop of Worcester against another lessee

J., said, if this case had arisen before the statute, "*there would have been good evidence to go to the jury of a user as of right for twenty years, notwithstanding the existence of the tenancy.*"

It should seem that any objection in respect of the land having been in lease which might have been taken at the common law may still be taken to a user for twenty years under the statute, although the statutory process of excluding the time of the lease is not open except in the case of forty years' user.

On the other hand, in the case of forty years' user, unless the reversioner should resist the claim within three years from the termination of the tenancy, he could not set up the existence of the lease in any way—not by way of exclusion from the computation, by reason of the express condition imposed by sect. 8, of resisting within the three years above mentioned, and not as at the common law by reason of the provisions of sect. 2, which, though they allow a twenty years' user to be defeated "*in any other way*" in which the same at the common law might be defeated, do not allow the forty years' user to be so defeated, but only by showing that the enjoyment was had under a written agreement, so that but for the 8th section the reversioner could make no use of the fact of the tenancy at all.

In short, there are two distinct ways in which the existence of a term of years may be taken advantage of : —

1. As showing, in connection with the other circumstances of the case, that there has not been enjoyment binding against the reversioner, ex. gr. as in the case of an enjoyment for twenty years, commencing during tenancy and continued through it, and not known to him and his agents.

2. As entitling the reversioner to have the period of enjoyment during the term *excluded* from the period of computation, so as virtually to extend the period of enjoyment required to be proved.

The first way was open at the common law, and is left untouched by the statute in so far as the period of twenty years' user is concerned, but is not left in the case of the forty years' user. The second way is the creature of the statute, and, according to the case of *Pulk v. Shinner*, is only applicable to a case of forty years' user; but if the person resisting the claim does not, by resisting it within three years from the end of the term, comply with the condition upon which only by the 8th section he can take advantage of the statutory mode of altogether excluding the term from the computation of the period of enjoyment, he is debarred from setting up the fact of the existence of the tenancy for years at all.]

(e) 1 C., M. & R. 211.

for obstructing a way, the evidence of the right consisted of an user for twenty years, during which time the land of the defendant had been in lease for lives; the Court of Exchequer held that the plaintiff had gained no right by such user against the bishop or any other person. But no evidence was given, nor was the question in any way raised, of the knowledge or acquiescence of the bishop (*f*).

Persons
against whom
enjoyment is
valid.

Upon the point how far the reversioner is bound by an enjoyment had during the continuance of a particular estate, two questions of great doubt and difficulty have been introduced by the statute:—

1st. Supposing the reversioner, being aware of the fact, from time to time gives a parol or written notice of his dissent to the enjoyment of the easement, any active interference on his part being prevented by the existence of the particular estate (*g*)—

2nd. Supposing the reversioner to be in total ignorance of any such enjoyment having been had during the continuance of the particular estate, and in consequence of such ignorance not to have availed himself of the exception in his favour contained in the statute (*h*)— [115]

[*(f)* The life tenancy being *absolutely* EXCLUDED by sect. 7 in computing the period of twenty years, the knowledge or acquiescence should seem to be immaterial. It has already been pointed out, that in *Bright v. Walker* the question was raised in a form which enabled the person resisting the claim to take every possible objection under the act without the necessity of specially pleading the existence of the tenancy for life.]

[*(g)* In this case, if the user is of twenty years, sensible, he would not be bound; if of forty, he certainly would, unless he resisted within three years from the expiration of the term. Sem. See ante, p. 198.]

[*(h)* In this case, if the user is of twenty years he would not be bound; if of forty, he certainly would, unless he resisted within three years from the expiration of the term. Sem. See ante, p. 198.]

Persons
against whom
enjoyment is
valid.

In either of these cases would a valid right to an easement be acquired?

At all events, if the user of any easement had actually commenced before the property over which it was claimed passed into the possession of the lessee, the mere fact of such tenancy having continued during a period of twenty years will not, it seems, be sufficient to defeat the right acquired by the lapse of time, unless it be also shown that the landlord, up to the time of granting the lease, was in ignorance that any such right was claimed. Thus, where a house was proved to have been built thirty-eight years, during the whole of which time there had been windows towards the adjoining premises, and these premises had belonged for a number of years to a family residing at a distance, none of whom were proved to have ever seen them, and they had been occupied by the same tenant during the last twenty years—the court held, that, after such a long enjoyment, the windows must be considered ancient windows, and that the plaintiff was consequently entitled to recover for their obstruction (*i*). *Bayley, J.*, in his judgment, says, “The right is proved to have existed for thirty-eight years; the commencement of it is not shown. It is possible that the premises both of the plaintiff and defendant once belonged to the same person, and that he conferred on the plaintiff, and those under whom she claims, a right to have the windows free from obstruction. *Daniel v. North* [116] has been relied on to show that the tenancy rebutted the presumption of a grant, but this is a very different case. Here tenancy was shown to have existed for twenty years, but the origin of the plaintiff’s right was

(*i*) *Gross v. Lewis*, 2 B. & C. 686; *S. C.* 4 D. & R. 234.

not traced." And *Littledale*, J., adds, "It was proved that the windows had existed for thirty-eight years, and the tenancy for twenty. How the land was occupied for eighteen years before that time did not appear. I think that quite sufficient to found the presumption of a grant" (*k*)

Persons
against whom
enjoyment is
valid.

As the claim of an easement is in derogation of the ordinary rights of property, it lies upon the party asserting such claim in opposition to common right, in all cases to support his case by evidence. In *Cross v. Lewis*, the absence of any evidence as to the earlier state of the windows was indeed held to operate in favour of the plaintiff—the party claiming the easement; but the substantial proof, viz. of the user for a period of twenty years, had already been given by the claimant; and this, unrebutted by any evidence to take the case out of the ordinary rule, was of course sufficient to establish the easement.

From the observations of the learned judge in the above case, it would appear, that, provided the existence of the easement prior to the commencement of the tenancy was shown, and a sufficient length of enjoyment had taken place to afford evidence of a grant, the burthen of proof would be thrown upon the owner of the land sought to be made liable to the easement; and unless he could show such previous user to have taken place without his knowledge, the right to the easement would be established (*l*).

Indeed it should seem from this case that proof of enjoyment for twenty years was in all cases *prima facie*

[*(k)* See *Palk v. Shinner*, ante, p. 197.]

[*(l)* See *Gray v. Bond*, 2 Brod. & Bing. 667; 5 J. B. Moo. 527.

Persons
against whom
enjoyment is
valid.

[117]

Disabilities in
computing
twenty years.

evidence of a title which must be rebutted by the owner of the servient tenement.

With respect to the party against whom the right is to be established, as a grant from the owner of the servient tenement is to be presumed, disability on his part to execute such a grant will exclude the presumption which would otherwise arise from user during the continuance of such disability.

By the recent statute, in all cases of computing the twenty years' user, except in the case of light, the time during which the servient owner may have been an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit to dispute the right afterwards abated by the death of any party may have been pending, is excluded (*m*). No provision is made for the case of a party being beyond the seas during the whole or any part of the period of prescription (*n*).

[(*m*) Under the 7th section these periods may be absolutely excluded, if properly pleaded, from the computation of the time of enjoyment, but independently of that advantage may still be taken of any of them, as at the common law, in respect of the shorter periods of enjoyment, though not of the longer, ante, p. 198, note; and in respect of statutory disabilities to grant (as in the case of *Mill v. New Forest Commissioners*, 18 C. B. 60; *Rochdale Canal Company v. Rudeliff*, 18 Q. B. 287),

a distinction appears to exist between those cases where there is simply no power to grant, and in those where there is an absolute prohibition; in the latter case it should seem that an enjoyment, even for the longer period, would confer no right,* though in the former it might. In neither can any right be gained under the statute by enjoyment for the shorter period; see p. 160, note.]

[(*n*) But in such case, although the time of such absence could not be absolutely excluded under

* *Staffordshire and Worcestershire Canal Company v. Birmingham Canal Company*, 11 Jur., N. S. 71; affirmed in House of Lords, L. R., 1 H. Lds. 254; *National Guaranteed Manure Company v. Donald*, 4 H. & N. 8.

Before the passing of the statute, an enjoyment of an easement for twenty years would have been evidence from which a jury might have found a non-existing grant from the owner of the particular estate, which would have been binding on him, although it could not affect the rights of the reversioner; but it was held in the case of *Bright v. Walker* that by virtue of the statute no such modified right to an easement can be acquired. To be valid against any, under the statute, it must be valid against all who have any estate in the land; [but this rule does not apply to the case of light, to which, by reason of the provisions of sect. 3, one lessee may acquire, as against another lessee under the same reversioner, a valid title to the light (*o*).]

Persons
against whom
enjoyment is
valid.

“The important question,” said Baron *Parke*, in *Bright v. Walker* (*p*), “is, whether this enjoyment, as it cannot give a title against all persons having estates in the *locus in quo*, gives a title as against the lessee and [118] the defendants claiming under him, or not at all? We have had considerable difficulty in coming to a conclusion on this point; but, upon the fullest consideration, we think that no title at all is gained by an user which does not give a valid title against all, and permanently affect the sec. Before the statute, this possession would indeed have been evidence to support a plea or claim by a non-existing grant from the termor in the *locus in quo* to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary

sect. 7, the fact might be set up under sect. 2, if the person absent could show ignorance by himself or his agents of the fact of the enjoyment during the *shorter* period, but not the longer.]

[(*o*) *Frewen v. Philips*, ante, p. 172.]

(*p*) 1 C., M. & R. 220; *Monmouth Canal Company v. Harford*, 1d. 614.

Persons
against whom
enjoyment is
valid.

occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. But, since the statute, such a qualified right, we think, is not given by an enjoyment for twenty years. For, in the first place, the statute is 'for shortening the time of *prescription*;' and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. And, in the next place, the statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute—valid as to some persons, and invalid as to others. From hence we are led to conclude, that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good as against every one, it is not good as against any one, and, therefore, not against the defendant." *

- [119] In this instance the enjoyment had continued during twenty years only. Where, however, the full period of forty years has elapsed, as that would confer a right to the easement, subject to the condition only that the reversioner interfered within three years after the determination of the particular estate, as in the cases of conditional estates, a valid right is given as against all the world, until by the happening of the condition the estate is defeated.

“The enjoyment of the right during forty years,” said the court in *Wright v. Williams* (q), “alleged in the pleas, being admitted, the replications, which state only an existing tenancy for life, are no answer; for the time of a tenancy for life in a person who might otherwise be capable of resisting the claim, though excluded by the 7th section from the computation of the shorter period of twenty years *absolutely*, is, by the 8th section, excluded from the computation of the longer period of forty years *conditionally* only; that is, provided the reversioner expectant on the determination of the term for life shall within three years (that is, probably, *before* the end of three years), after such determination, resist the right; and it does not appear that the plaintiff is entitled to the reversion *expectant on that lease*, though it is averred that he has a reversion expectant on the determination of the interest of the tenant in possession. The tenancy for the life of Lord Dinorben, the *cestui que vie*, is therefore not to be excluded, on these pleadings, from the period of forty years; and, such period being complete, the defendant is entitled to an indefeasible right to the easement claimed.” *

Persons
against whom
enjoyment is
valid.

(q) 1 M. & W. 100.

* User for twenty years by the tenant and occupier of clay works is sufficient to give him a prescriptive title to a watercourse (*Gared v. Martyn*, 19 C. B., N. S. 732); and the use of a stream from time immemorial by tin bounders, who merely have a right by custom to work the tin, is sufficient to give a right by immemorial prescription to the owner of the land—the presumption being that the stream was originally diverted by arrangement with the owner. (*Ivimey v. Stocker*, L. R., 1 Ch. Ap. 396.)

A tenant cannot prescribe for an easement against his landlord. The possession of the tenant is the possession of his landlord; and it seems to be an utter violation of first principles of the relation of landlord and tenant to suppose that the occupation of the tenant, whose occupa-

Persons to
whom user
will give an
easement.

[120]

Although the user by which it is sought to acquire an easement must be that of the party in possession of the dominant tenement, yet any user under a claim of right in respect of such tenement will be in contemplation of law user by such possessor. Hence it appears that there is no disability (*r*) of any kind to destroy the effect of such user; unless, indeed, the extreme case adverted to in the civil law be supposed—of the only user being by a person not having the use of reason, in which case no right was acquired, the intention to assert a right not existing. This was illustrated by the instance of putting something into the hand of a man when asleep (*s*).

User by an infant capable of understanding what he

·[*r*] Except a statutory incapacity. See *National Manure Company v. Donald*, 4 II. & N. 8.]

(*s*) Furiosus et pupillus sine tutoris auctoritate non potest incipere possidere; quia affectionem tenendi non habent, licet maxime corpore suo rem contingant; sicuti si quis dormienti aliquid in manu

ponat. Sed pupillus tutore auctore incipiet possidere. Otilius quidem et Nerva filius, etiam sine tutoris auctoritate possidere incipere posse pupillum aiunt; eam enim rem facti, non juris esse: quæ sententia recipi potest, si ejus ætatis sint ut intellectum capiant.—L. 1, s. 3, ff. de adq. vel amit. poss.

tion of close A. is the occupation of his landlord, could by that occupation acquire an easement over close B., also belonging to his landlord; the duty of the tenant being that, if he passes over close B., he should do nothing on it more than his lease authorized him to do. (*Gayford v. Moffatt*, L. R., 4 Ch. 135; *Daniel v. Anderson*, 8 Jur., N. S. 328.) The principle that a tenant can do nothing to injure his landlord's interest does not apply to the case of unity of possession by the tenant of land over which the easement of light is claimed, and the house in respect of which it is claimed, during part of the period of twenty years during which light has been enjoyed. Until the whole period has elapsed the legislature gives no right or title to damnify the neighbour's property by preventing him from doing as he pleases with it. There is nothing in the tenant's act in taking the adjacent land to prejudice the landlord's right, because the landlord had no right anterior to the lapse of twenty years. (*Ladyman v. Grave*, L. R., 6 Ch. 768.)

was doing was sufficient to acquire the servitude. So also was user by a tenant or servant, even without the owner's knowledge (*t*).

Persons to whom user will give an easement.

[User under an act of parliament authorizing a man to use any particular easement, could not be made available to eke out a period of twenty years' enjoyment, although continued after the repeal of the act for a sufficient number of years to make, together with the years of enjoyment under it, the period of twenty (*u*).]

SECT. 3.—*Qualities of the Enjoyment.*

[121]

In order that the enjoyment, which is the quasi possession of an easement, may confer a right to it by length of time, it must have been open, peaceable, and "as of right" (*x*).

The effect of the enjoyment being to raise the presumption of a consent on the part of the owner of the servient tenement, it is obvious that no such inference of consent can be drawn, unless it be shown that he was aware of the user, and, being so aware, made no attempt to interfere with its exercise. Still less can such consent be implied, but rather the contrary, where he has contested the right to the user, or where, in consequence of

Nec vi, nec clam, nec precario.

(*t*) Is cujus colonus, aut hospes, aut quis alius iter ad fundum fecit; usus videtur itinere, vel actu, vel viâ, et ideo interdictum habebit; etiam si ignoravit cujus fundus esset, per quem iret, retinere eum servitutem.—L. 1, s. 7, ff. de itinere.

any other evidence to show that the user by the claimant was independent of the act, the case would be otherwise.]

[(*u*) *Kinloch v. Nevile*, 6 M. & W. 806. If, however, there had been a user prior to the act, or

(*x*) "The sort of possession that is required to establish a prescription is the same in the civil law, the law of Jersey, and our common law," per Lord Wynford in *Benest v. Pipon*, P. C. 1 Knapp, 70.

Qualities of
the enjoyment.

such opposition, an interruption in the user has actually taken place. Even supposing these defects of the user not to exist, still the effect of the user would be destroyed if it were shown that it took place by the express permission of the owner of the servient tenement, for in such a case the user would not have been had with the intention of acquiring or exercising a right. The presumption, however, is, that a party enjoying an easement acted under a claim of right until the contrary is shown (*y*).

The civil law expressed the essential qualities of the user, by the clear and concise rule that it should be “*nec vi, nec clam, nec precario*” (*z*).

[122] The doctrine of the law of England, as cited by Lord *Coke*, from Bracton, exactly agrees with the civil law. The possession must be long, continuous, and peaceable. Long, that is, “during the time required by law; continuous, that is, uninterrupted by any lawful impediment; and peaceful, because, if it be contentious, and the opposition be on good grounds, the party will be in the same condition as at the beginning of his enjoyment. There must be ‘*longus usus nec per vim, nec clam, nec precario*’” (*a*). “*Transferuntur dominia sine titulo et traditione per usucaptionem, scilicet per longam, continuam, et pacificam possessionem. Longa, i. e. per spatium temporis per legem definitum. Continuum dico, ita quod non sit legitimè interrupta. Pacificam dico, quia si contentiosa fuerit, idem erit quod priùs, si contentio fuerit justa. Ut si verus dominus, statim, cum intrusor vel disscissor ingressus fuerit seisinam, nitatur tales viribus repellere, et expellere, licet id quod inceperit*

(*y*) *Campbell v. Wilson*, 3 East, 294. si serv. vind.

(*a*) Co. Litt. 113, b; Bracton, lib. 2, f. 51 b. 52 a, 222 b.

(*z*) C. L. 1, ff. de serv. L. 10, ff.

perducere non possit ad effectum, dum tamen cum defecerit, diligens sit ad impetrandum et prosequendum. Qualities of the enjoyment.
 Longus usus nec per vim, nec clam, nec precario, &c."(b).

The enjoyment must be peaceable.

At common law any acts of interruption or opposition, Nec vi. from which a jury might infer that the enjoyment was not rightful, were sufficient to defeat the effect of the enjoyment, the question being whether, under all the facts of the case, such enjoyment had been had under a concession of right.

By the statute it is enacted that nothing shall be deemed to be an interruption, unless it shall be submitted to, or acquiesced in, for the space of a year after the party interrupted shall have notice thereof, and of the [123] person making or authorizing the same (c).

It is certainly by no means clear what the precise intention of the legislature was; but it appears hardly possible that it should have been intended to confer a right by user during the prescribed period, however "contentious" or "litigious" such user may have been (d). In the case of *Bailey v. Appleyard* (e), where a right of way was claimed, the use of which had been materially obstructed by a "stang," *Patteson, J.*, left the question

[(b) "These words, 'as of right,' occur in sect. 5 of 2 & 3 Will. 4, c. 71. There has been much difficulty as to their construction, but it seems clear that if the enjoyment has been clandestine, contentious or by sufferance, it is not of right." Per *Erle, J.*, 17 Q. B. 275. This, as already shown, is subject to one exception. See ante, p. 167.]

(c) See ante, p. 175 (c).

(d) See *Wright v. Williams*, 1 M. & W. 100. [And it has been held, in *Eaton v. Swansca Waterworks Company*, 17 Q. B. 267, that such was not the intention of the legislature. See p. 176.]

(e) 3 Nev. & P. 257; S. C. 8 A. & E. 161, and corrected in note in the same volume.

Qualities of
the enjoyment.

to the jury "whether the stang had prevented the exercise of the right" (f). *

(f) The report of the case of *Bailey v. Appleyard* was first published in 3 N. & P. 257; it afterwards appeared in 8 Ad. & El. 161. On the case, as it appeared in these reports, the following observation was made in the first edition of this work. "In the recent case of *Bailey v. Appleyard*, the erection of a rail by the owner of the servient tenement within the shorter period of the statutory prescription was held sufficient to prevent the acquisition of the right; and it was decided that it was incumbent on the plaintiff to prove an enjoyment not interrupted, every interruption being presumed to be hostile until the contrary was shown. It does not appear from the report that in this instance the interruption was acquiesced in, or even continued for a year." In the 8th volume of Adolphus & Ellis, the reporters, after adverting to the appearance of the above passage, gives the following very important correction of the report of the case. "The learned judge who tried the cause of *Bailey v. Appleyard* has favoured the reporters with a note

of the facts proved before him, from which it appears that the report of the case, above referred to, and that in the present volume (p. 161), are incorrect in representing that on the trial any question ultimately turned upon an interruption within thirty years.

"The plaintiff endeavoured to show that the tenant of Upper-house Farm (in respect of which the plaintiff claimed) had for more than thirty years pastured his cattle in Toadholes Lane as far as a close called Potover Lane, but it was proved that a stang, or rail, sufficient to prevent cattle from passing, had been erected across Toadholes Lane, between Upper-house Farm and Potover Lane. *It did not appear when the stang was put up*; but it had stood much more than two years before its removal in 1809. A neighbouring proprietor had been accustomed to turn his cattle into Toadholes Lane from the Potover Lane end; and the stang obstructed the passage of his cattle towards Upper-house Farm, as well as the passage of cattle from Upper-house Farm into the part of Toadholes Lane

* An act of partial interruption, instead of destroying the easement claimed, may qualify it, and be evidence of another easement. Thus, where a wear across a river was claimed by prescription, and a miller, whose mill was on its banks, had caused a fender to be shut down, the court held this not fatal to the claimant's right, thinking that there was nothing to prevent a second easement being acquired, as subordinate to that already existing, if the subject matter admitted of it. (*Rolle v. Whyte*, L. R., 3 Q. B. 302.)

By the civil law any enjoyment was said to be forcible to which opposition was offered, either by word or deed, by the owner of the servient tenement (*g*). Qualities of the enjoyment.

The enjoyment must be open.

The user of an easement may be secret, either from the mode in which a party enjoys it, or from the nature of the easement itself. Nec clam.

Instances of the former kind are where the right is exercised by stealth, or in the night (*h*).

between the stang and Potover Lane. By agreement between the two proprietors in 1809, a gate was put up at the end of Potover Lane; the stang was then removed; and from that time the cattle of the plaintiff's predecessor depastured the whole of Toadholes Lane up to the gate. The plaintiff's counsel argued that the stang was not necessarily an interruption of the plaintiff's enjoyment of pasture over the locus in quo; and that, if it was not, the evidence showed an enjoyment of many years before 1809. The learned judge left it to the jury to say whether the stang had *prevented the exercise of the right*. Verdict for the defendant.

"No question, therefore, at the trial, turned on the effect of an *interruption*; but, if the stang was erected adversely to the right insisted on by the plaintiff, he failed in proving a thirty years' enjoyment, because the evidence, as far as it went, showed that the enjoyment, as claimed, had not begun till 1809, and the plaintiff had been excluded, and not interrupted, during the first two years

of the thirty. And even if it had appeared that the stang ought to have been treated as an 'interruption,' it was plain that it had existed and been acquiesced in for more than a year. On the motion, reported ante, the term 'interruption' was used; but it was evidently unnecessary, for the purpose of the decision, to employ it in any other sense than that of obstruction."

(*g*) Vi factum videri, Quintus Mucius scripsit, si quis contra quam prohiberetur, fecerit: et mihi videtur plena esse Quinti Mucii definitio. Sed et si quis jactu vel minimi lapilli prohibitus facere, perseveravit facere: hunc quoque vi fecisse videri, Pædus et Pomponius scribunt, eoque jure utimur. —L. 1, s. 5, 6, ff. quod vi aut clam.

Prohibitus autem intelligitur, quolibet prohibentis actu: id est vel dicentis se prohibere, vel manum opponentis, lapillumve jactantis prohibendi gratiâ.—Ibid. L. 20, s. 1.

(*h*) Itaque clam nanciscitur possessionem, qui futuram controversiam metuens, ignorante eo, quem metuit, furtive in posses-

Qualities of
the enjoyment.

[124]

Instances of the latter kind occur where a claim is made to an extraordinary degree of support to a house from the neighbouring soil, in consequence of an excavation on the party's own land, not visible to the neighbour (*i*).

A consideration of this rule would, it appears, afford an answer in the affirmative to the question incidentally raised in the case of *Dodd v. Holme* (*k*),—whether, in order to acquire a right to support for a house by antiquity of possession, it must originally have been built with that degree of strength and coherence which may reasonably be expected to be found in a well-built house,—for as there might be nothing in the external appearance of the house to give notice to the owner of the adjoining land that the weakness with which it was built caused it to require a greater degree of support from his soil than a well-built house would have required, and *quoad* such additional support the enjoyment would have been secret, no presumption of a grant of it on his part could be implied.

[125] The same reasoning would also apply to the case of an ancient house, originally well-built, becoming weaker from the want of proper repair. A man believing there were no minerals on his own land might be willing to subject it to the easement of support to a well-built house, which would diminish the value of his property

sionem ingreditur.—L. 6, ff. de adq. vel amit. poss.

Talis usus non valebit, cum sit clandestinus, et idem erit si nocturnus.—Bracton, lib. 2, f. 52 b.

Aut in absentia domini.—Ibid. Lib. 4, f. 221 a.

See *Darson v. Duke of Norfolk*, 1 Price, 246. [See as to the

case of a bailiff claiming a right by user over his master's property, *Officers of State v. Earl of Haddington*, 5 Wils. & Shaw, Sc. App. 570.]

(*i*) *Partridge v. Scott*, 3 M. & W. 229.

(*k*) 1 A. & E. 493; 3 Nev. & Man. 739.

only in the event of his wishing to mine in it, although he would refuse to restrict himself from digging a foundation for any building he might require; which would possibly be the case were he bound to afford the support necessary to sustain a rickety and ill-built edifice.

Qualities of
the enjoyment.

This reasoning also applies to the claim of support from adjoining houses (*l*).*

By the civil law it was sufficient to vitiate the user, if, from the acts of the party, an intention of concealment could be inferred (*m*). This intention might be deduced from the manner in which the act was done, and the Digest contains a variety of instances in which such an intention was inferred from the facts (*n*).

The enjoyment must be as of right.

Nec precario.

Enjoyment had under a license or permission from the owner of the servient tenement, as has been already remarked, confers no right to the easement. Each renewal of the license rebuts the presumption which would otherwise arise, that such enjoyment was had under a claim of right to the easement (*o*).

(*l*) See per *Bramwell, B.*, in the case of *Solomon v. Vintners' Company*, 4 II. & N. 601, acc. In the last-mentioned case the court laid down that the Prescription Act 2 & 3 Will. 4, c. 71, does not apply to such a right at all; see post, Rights of support to Buildings by Buildings.]

(*m*) Idem Aristoputat, eum quo-

que clam facere, qui celandi animo habet eum, quem prohibitorium se intellegcrit, et id existimat, aut existimare debet, se prohibitum iri.—L. 3, § 8, ff. quod vi aut clam.

(*n*) L. 3, §§ 7, 8, ff. quod vi aut clam.

(*o*) *Monmouthshire Canal Company v. Harford*, 1 C. M. & R. 614; see ante, pp. 154, 170.

* On this ground the diversion of a stream for twenty years by a lower proprietor does not affect the rights of a higher proprietor, or entitle the lower proprietor to prescribe against him that the diverted water shall be pure. (*Stockport Waterworks Company v. Potter*, 3 H. & C. 326; *Sampson v. Hoddinott*, 1 C. B., N. S. 590.)

Qualities of
the enjoyment.

[126] Any admission, whether verbal or otherwise, that the enjoyment had been had by permission of the owner of the servient tenement, was sufficient, before the recent statute, to prevent the acquisition of the right, however long such enjoyment might have continued. "Si autem," says Bracton, "(seisina) precaria fuerit et de gratiâ, quæ tempestive revocari possit et intempestive, ex longo tempore non acquiritur jus" (p).*

By the statute a distinction is made as to the effect of a parol license in those cases in which the right is declared to be absolute and indefeasible, and those in

(p) Lib. 4, f. 221 a.

* If the enjoyment commenced by permission it is a question for the jury whether it did not continue by permission. (*Gaved v. Martyn*, 19 C. B., N. S. 732.) The use of waste water from a canal is not an enjoyment as of right. (*Staffordshire & Worcestershire Canal Company v. Birmingham Canal Company*, L. R., 1 H. Lds. 254.)

An enjoyment, in fact, for more than the statutable period is not an enjoyment as of right if, during the period, it is known that it is only permitted so long as some particular purpose is served. Thus, where the diversion of water by a canal company under the powers of their act caused the bed of the stream to be silted up, and, on the restoration of the water to its original course, the bed was insufficient to carry off the flood waters, it was held that the riparian proprietor had no prescriptive right to have the diversion continued, because the benefit to him of the diversion was a precarious enjoyment. (*Mason v. Shrewsbury and Hereford R. Co.*, L. R., 6 Q. B. 578.)

The plaintiff sought to restrain the defendant from building to the obstruction of his light and air. The defence was that the defendant had for many years before he began to build used the ground on which he was building as a stack yard, and that stacks of hay and corn higher than the buildings complained of, had been placed by him on the land, some of which remained for the greater part of the year. *Wood, V.-C.*, held that the plaintiff had not made out his right. The defendant had obscured the windows as often as he pleased, and as long as he pleased. The plaintiff stood in the position of one who, by opening his window, took his chance of getting what light he could against the neighbouring farmer, who had the right to block him up when he liked. (*Brook v. Archer*, 3 W. N. 5.)

which there is no such provision. In the former instance, although the enjoyment commenced by permission, yet after it has continued during the requisite period (forty years in general, and twenty in the case of lights), the right cannot be invalidated, except by proof that the easement "was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing (q). Qualities of the enjoyment.

The latter case is not affected by the statute.

The "precarious enjoyment" of the Civil Law, by which, as has been already seen, no prescriptive right could be acquired, is identical with the permissive enjoyment of the English law (r).

For the same reason, that the enjoyment must be such as to afford evidence of the acknowledgment of the right to an easement as such, by the owner of the servient tenement, no right is acquired by the enjoyment of an easement which has been had during the time of a unity of possession of the dominant and servient tenements; and it has been decided in a recent case, that, in computing the period of twenty years' enjoyment "next before the action brought," under the statute, not only must the time during which the unity continued be excluded, but that the operation of the unity is to suspend the process of acquisition while it lasts, and to Unity of possession. [127]

[(q) The effect of the statute is that in the case of the longer periods, a right may be acquired by an enjoyment which at the common law would have been bad as "a precarious enjoyment;" see ante, p. 167, note. The whole matter is explained in *Tickle v. Brown*, 4 A. & E. 369.]

(r) *Precarium est, quod precibus*

petenti utendum conceditur (tamdiu) quamdiu is, qui concessit, patitur.—L. 1, ff. de precario.

Veluti si me precario rogaveris, ut per fundum meum ire, vel agere tibi liceat: vel ut in tectum vel in arcam ædium mearum stillicidium vel tignum in parietem immissum habeas.—Ibid. L. 3.

Qualities of
the enjoyment

Interruption
by servient
owner under
the statute.

destroy altogether the effect of the previous user, by breaking the continuity of the enjoyment (*s*).

A claim under the statute to an easement by enjoyment during the periods therein specified may be conclusively rebutted, and the user shown not to have been as of right, by evidence of a breach of the continuity of possession by an act of interruption on the part of the servient owner acquiesced in for a year after notice (sect. 4) (*t*); [and so it may by evidence of repeated interruptions of less than a year, if they be sufficient to show that the enjoyment was contentious (*u*).]

In delivering the judgment of the Court of Exchequer, in *Bright v. Walker*, in which the qualities of an enjoyment necessary to clothe it with right by lapse of time were considered, Baron *Parke* said (*x*), "In order to establish a right of way, and to bring the case within this section (2nd), it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so, 'as of right;' for that is the form in which, by section 5, such a claim must be pleaded; and the like evidence would have been required before the statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done—if he shall have occasionally asked the permission of the occupier of the land—no title would be acquired, because it was

[128] not enjoyed 'as of right.' For the same reason it would

(*s*) *Onley v. Gardiner*, 4 M. & W. 496; *Clayton v. Corby*, 2 G. & D. 183; [2 Q. B. 813; *Battis-hill v. Reed*, 18 C. B. 696.]

[(*t*) See ante, p. 175, note (*o*).]

[(*u*) *Eaton v. Swansea Water-works*, ub. sup.; 17 Q. B. 267; see ante, p. 175, note (*o*).]

(*x*) 1 C., M. & R. 219.

not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed 'as of right' the easement, but the soil itself. So it must have been enjoyed without interruption. Again, such claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription or grant, would now be defeasible; and, therefore, it may be answered by proof of a grant, or of a license, written or parol, *for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised.*"

Qualities of
the enjoyment.

The authority of this case, and the doctrines laid down by the court in it, were fully recognized in *The Monmouthshire Canal Company v. Harford* (y), and *Tickle v. Brown* (z). *

(y) 1 C., M. & R. 614.

(z) 4 A. & E. 369.

* It must also be lawful. The right to have a wear in a river was disputed on the ground that the enjoyment was not lawful; but the courts, holding that the statutes prohibiting wears in rivers were confined to navigable rivers, decided that a wear in a river not navigable could be claimed by prescription. (*Rolle v. Whyte*, L. R., 3 Q. B. 286; *Lord Leconfield v. Earl of Lonsdale*, L. R., 5 C. P. 657.)

CHAPTER VI.

OF PARTICULAR EASEMENTS AND PARTICULAR NATURAL
RIGHTS OF A SIMILAR CHARACTER.SECT. 1.—*Rights to Water.*

RUNNING water is the subject of easements of several kinds. The right to receive a flow of water in a natural stream, and transmit it in its accustomed course, is an ordinary right of property—a Natural Right: the right to interfere with the accustomed course, either by penning it back upon the land above, or transmitting it altered in quality or quantity to an extent not justified by natural right (*a*), is an Easement.

The right to have a natural stream run in its accustomed course does not arise by prescription, but “*jure naturæ*,” and of common right as an ordinary incident of property; the right to interfere with this natural course, by altering the quality or quantity of the water, is an Easement, and is claimable by prescription.

No prescrip-
tion against
prescription.

“When a man has a lawful easement or profit by prescription, from time whereof, &c., another custom, which is also from time whereof, &c., cannot take it away; for the one custom is as ancient as the other; as if one has a way over the land of A. to his freehold by prescription, from time whereof, &c., A. cannot allege a prescription or custom to stop the said way” (*b*).

(*a*) See p. 233.

(*b*) *Aldred's case*, 9 Rep. 58 b.

The difficulty here suggested does not arise with regard to a natural stream, the right to the flow of it not arising by prescription; and if a man declares for a disturbance of the course of a stream, it is a good plea to justify the diversion in virtue of an easement so to do.

Bracton appears to consider the obligation to respect the natural course of a flowing stream as a duty imposed by law; and that, unless justified by an easement, a man has no more right to divert the course of a stream than to discharge water upon his neighbour's land: "Item a jure imponitur servitus prædio vicinorum; scilicet ne quis stagnum suum altius tollat, per quod tenementum vicini submergatur. Item ne faciat fossam in suo per quam aquam vicini divertat, vel per quod ad alveum suum pristinum reverti non possit in toto vel in parte" (c).

Natural rights
and acquired
easements in
running water.

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In the Courts of the United States, which recognize and profess to be guided by the principles of the English law, this point has received much consideration. In an elaborate judgment of Mr. Justice *Story*, the right to have a stream flow on in its accustomed course is laid down to be a right universally incident to the property in the adjoining land, a right which can only be interfered with by the acquisition of an easement; and the ordinary rights of the owners of the adjacent land to the natural flow of the stream are distinguished with great precision from the acquisitions in derogation of the common rights made by an exclusive appropriation of the water.

"*Primâ facie* (d), every proprietor upon each bank of

Judgment of
Story, J.

(c) Bracton, lib. 4, f. 221 a.

(d) *Tyler v. Wilkinson*, 4 Mason, U. S. R. 397.

Judgment of
Story, J.

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a river is entitled to the land covered with water, in front of his bank, to the middle thread of the stream; or, as it is commonly expressed, *ad medium filum aquæ*.* In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself, but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of the river, the right being common to all the proprietors on the river; no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors

* In *The Earl of Zetland v. The Glover Incorporation of Perth* (L. R., H. Lds. 2 Sc. 70), a question arose as to the right of fishing in the Tay, the usage being the same as the rule, that each should fish *ad medium filum*. A drifting island had sprung up which gradually increased from the operation of currents, tides and floods. It was contended by the Earl of Zetland that as it was nearer his side of the river, the measurement should be from the outer side of the island; but it was held that the island was to be reckoned as part of the bed of the river. Lord Westbury said, that if the island had become annexed to the bank, so as to become a permanent accretion, he should have been of opinion that the appellant would have had the right to have the river measured from the north side of this permanent accretion. It may be doubted whether this circumstance would alter the boundaries of the riparian proprietors, which is assumed to have been in the middle of the stream from time immemorial.

In *Mayor and Corporation of Carlisle v. Graham* (L. R., 4 Ex. 861), the corporation had a several fishery in a tidal river which changed its course, and it was decided that they had no right in the new channel, their claim being founded on a grant from the owner of the soil through which the river anciently flowed.

of that which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood as holding the doctrine, that there can be no diminution whatsoever, and no obstruction or impediment whatever, by a riparian proprietor, in the use of the water as it flows, for that would be to deny any valuable use of it. There may be, and there must be allowed to all, of that which is common, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors, or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current, indispensable for the general and valuable use of the water, perfectly consistent with the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious, by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness, which would destroy private rights. The maxim is applied, *sic utere tuo ut alienum non lædas*.

Judgment of
Story, J.

“But of a thing common by nature, there may be an appropriation by general consent, or grant. Mere priority of occupation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That sup-

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Judgment of
Story, J.

poses no ownership already existing, and no right to the one already acquired. But our law awards to the riparian proprietors the right to the use in common, as one incident to the land: and whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law. Now this may be either by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment without interruption, which affords a just presumption of right. By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right. I say of a grant or right—for I very much doubt whether the principle now acted upon, however in its origin it may have been confined to presumptions of a grant—is now necessarily limited to considerations of this nature. The presumption is applied as a presumption *juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law.

* * * *

134] “With these two principles in view, the general rights of the plaintiffs cannot admit of much controversy. They are riparian proprietors, and, as such, are entitled to the natural flow of the river without diminution to their injury. As owners of the lower dam, and the mills connected therewith, they had no rights beyond those of any other persons, who might have appropriated that portion of the stream to the use of their mills; that is, their rights are to be measured by the extent of their natural appropriation, and use of the water for a period, which the law deems a conclusive presumption in favour

of rights of this nature. In their character as mill owners, they have no title to the flow of the stream beyond the water actually and legally appropriated by the mills ; but in their character as riparian proprietors, they have annexed to their lands the general flow of the river, as far as it has not been already acquired by some prior and legally operative appropriation.

Judgment of
Story, J.

“No doubt, then, can exist as to the right of the plaintiffs to the surplus of the natural flow of the stream not yet appropriated. Their rights, as riparian proprietors, are general; and it is incumbent on the parties, who seek to narrow those rights, to establish, by competent proofs, their own title to divert and use the stream.”

As an easement is something superadded to the ordinary rights of property, and it is incumbent on the claimant thus seeking to cast a burthen upon his neighbour to prove his title to it, it is evidently essential, in order to determine in what manner and what amount of evidence shall be given to support the title, to ascertain strictly what are the bounds of the ordinary rights of property, and where the right claimed assumes that accessorial character which trenches upon the liberty of another. Thus, with reference to the question above alluded to, it becomes important to consider whether the right to receive the water is one of the ordinary incidents of the ownership of the soil, or an additional right claimed as an easement.

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In discussing this question, a misconception appears to have taken place; the right to the corporeal thing, water itself, has been confounded with the incorporeal

right to have the stream flow in its accustomed manner (*e*). Upon this a further error was founded—that the first appropriator of water had a right to continue to divert the stream to the extent of such appropriation, no matter how injurious such diversion might be to the rights of parties who should afterwards seek to use the stream.

[136] The question has been much debated—what nature of property existed by law, or could exist, in air, light and water. It has been attempted to rest that right to the enjoyment of these elements upon the first occupancy of a common right. Thus, Blackstone, in his chapter on “Title by Occupancy,” after remarking, that a property in goods and chattels might be acquired by occupancy—“the original and only primitive method of acquiring any property at all”—lays it down, that “the benefit of the elements—light, air, and water,—can only be appropriated by occupancy. If I have an ancient window overlooking my neighbour’s ground, he may not erect any blind to obstruct the light; but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall, for there the first occupancy is rather in him than in me. If my neighbour makes a tan-yard, so as to annoy, and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue. If a stream be unoccupied, I may erect a mill thereon, and detain the water, yet not so as to injure my neighbour’s prior mill or his meadow, for he hath, by the first occupancy, acquired a property in the current” (*f*).

(*e*) *Mason v. Hill*, 5 B. & Adol. 19; 2 Nev. & M. 747.

(*f*) 2 Black. Com. 402.

The last two illustrations appear to be incorrect, and directly at variance with the later decisions upon this subject (*g*).

Even if it were conceded that these elements are, by the law of England, still in common, and subject to be made property by occupancy, analogy to the rules which govern the acquisition of property by this means, points out, that the appropriation of a particular portion could give no right of property in more than that portion. The abstraction of a measure of water from a flowing stream to-day, can give no property in water which may possibly hereafter form part of the stream, but which is now on the mountains. The present reception of light by a window cannot give a prospective property in the light itself, which will pass through the window to-morrow, and which has not yet emanated from the sun. [137]

The right principle to be collected from the authorities is, [that "the right to have a stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; that flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property (*h*) in the water itself, except in the particular portion which he may think proper to

Result of
authorities.

(*g*) *Bliss v. Hall*, 4 Bing. N. C. 183; S. C. 6 Scott, 500, post; *Mason v. Hill*, 3 B. & Ad. 304; 5 B. & Ad. 1.

[(*h*) Except by virtue of some statute. See *Proprietors of Medway v. Earl of Romney*, 9 C. B., N. S. 575.]

abstract from the stream and take into his possession, and that, during the time of his possession only, but that each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it, and that this right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of *all* the water in its natural state, but is a right only to the flow of the water, and the enjoyment of it, subject to the similar natural right of all the proprietors of the banks on each side to the reasonable enjoyment of the same stream; and that it is only, therefore, for an unreasonable and unauthorized use of this common benefit that an action will lie; but that for such an use it will, even though there may be no *actual* damage to the plaintiff" (*i*), and that if the user by the riparian owner goes beyond his natural right, it matters not how much the plaintiff (whose natural right is affected by such user) has used the water, or *whether he has ever used it at all*; in either case his *right* is equally invaded, and an action is maintainable (*h*).]

[(*i*) *Embrey v. Owen*, 6 Exch. 369.]

[(*h*) See judgment in *Sampson v. Hoddinott*, 1 C. B., N. S. 611; see also 3 Kent's Commentaries, 439--445, quoted in the judgment in *Embrey v. Owen*, *ub. sup.* In *Miner v. Gilmour*, 12 Moore, P. C. 156, Lord Kingsdown, delivering judgment on an appeal from Lower Canada, after stating that there was no distinction between the English law and that applicable to the case before their lordships, said, "By the general law applicable to running streams, every

riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, for the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either

It was formerly made a question whether the simple fact of the water running in a natural channel to and

above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation; but he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.*

In *Lord v. Commissioners of City of Sidney*, 12 Moore, P. C. 473, it was argued that a riparian owner who, by express words in the conveyance to him, is excluded from the ownership of the bed of the stream *ad medium flum aquæ*,

(which in the absence of such words is implied,) does not possess the rights of a riparian proprietor to the water of the stream. No express decision was pronounced as to this (the claimant being held entitled to the bed), but their lordships said that they did not accede to the argument. See also the last-mentioned case, as to the effect of a reservation in a grant of land upon the bank of a river of the right to the use of the water, upon the rights of the grantee in respect of other lands on the same stream of which he is owner.

* In *Lord Norbury v. Kitchin* (3 F. & F. 292; 9 Jur., N. S. 132), *Martin, B.*, in his direction to the jury, quoted this passage as containing the law on the subject, and ruled that the riparian proprietor could only take the water for a purpose of utility, and not to make an ornamental pond. The plaintiff's counsel moved for a new trial, on the ground that the dictum of Lord *Kingsdown* stated the right of a riparian proprietor too extensively. The court did not decide that it was exactly correct, but discharged the rule on the ground that the defendant had not taken an unreasonable quantity of water. The stream sent down 333,000 gallons a-day, and the defendant abstracted from 8,000 to 9,000.

In *Nuttall v. Bracerwell* (L. R., 2 Ex. 9), *Martin, B.*, says, "The law has been supposed to be well settled, and in my opinion is nowhere more clearly stated than by Lord *Kingsdown* in *Miner v. Gilmour*." And he cites the above passage, and says that there is no doubt that it is the law. And *Channell, B.*, delivering the judgment of *Pollock, C. B.*, and himself (p. 13), says, "I quite agree that the passage quoted by my brother *Martin* from Lord *Kingsdown's* judgment very clearly, as well as accurately, states the law applicable to running streams."

It is not a reasonable use of a river for a riparian proprietor to erect a permanent building in the channel of the stream. The opposite proprietor may maintain an action against him for so doing without proof *Bickett v. Morris*.

through land, is sufficient to confer upon the owner of it this right to prevent his neighbour's interference;

of actual damage. This was so decided by the House of Lords on a Scotch Appeal, and it seems that the law of England is the same. (Per Lord *Crannorth*, p. 58.) "By the law of Scotland, as by the law of England, where the lands of two conterminous proprietors are separated from each other by a running stream of water, each proprietor is *prima facie* owner of the soil of the *alveus*, or bed of the river, *ad medium filum aquæ*. The soil of the *alveus* is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that if from any cause the course of the stream should be permanently diverted; the proprietors on either side of the old channel would have a right to use the soil of the *alveus*, each of them up to what was *medium filum aquæ*, in the same way as they were entitled to the adjoining land. The appellant contended that as a consequence every riparian proprietor is at liberty at his pleasure to erect buildings on his share of the *alveus*, so long as the other proprietor cannot show that damage is thereby occasioned or likely to be occasioned to him. I do not think that this is a true definition of the law.

"Rivers are liable at times to swell enormously from sudden floods and rain, and in these cases there is danger to those who have buildings near the edge of the bank, and indeed to the owners of the banks generally, that serious damage may be occasioned to them."

He afterwards says, "That merely to put a stake in the river would not be actionable, on the principle of *de minimis non curat prætor*; and also that it might be demonstrated in such case, not that there was an extreme improbability, but even impossibility, of damage resulting to any one from the use." And Lord *Chelmsford*, L. C., said, "That it would be a perfectly fair use of the rights of a riparian proprietor to build a boat-house on its banks, provided he did not thereby obstruct the river or divert its course." (*Bickett v. Morris*, L. R., 1 H. of Lds., Sc. & D. Ap. 47; see, too, Lord *Norbury v. Kitchin*, 1 W. N. 366; 19 L. T., N. S. 501.)

And *Wood*, V.-C., in *Crossley v. Lightowler* (L. R., 3 Eq. 296), says, "a riparian proprietor has the right to the use of the water whenever he may want to enjoy it. It is quite true that at this moment it is not made use of by the plaintiffs for watering their cattle or for any other purpose, but they have a right to the user and a right to interfere with anything that injures that right of user in such a manner as that, if not interrupted for twenty years, the person so injuring the right would acquire a title."

In *Wilts & Berks Canal Navigation Co. v. Swindon Waterworks Co.* (L. R., 9 Ch. 451; affirmed on appeal, 10 W. N. 138), the

and whether there must be some more direct and tangible perception of the benefit of the water; and if so,

defendants, a waterworks company, partly from public motives partly for private profit, were minded to supply the town of Swindon with water, and wished to use and divert the water of a stream for that purpose. The Lords Justices held that such was not a purpose for which a riparian proprietor was entitled to take the water from its natural course. Actual pecuniary damage was not necessary to give a right of action or suit, because it was sufficient to show that the defendants were interfering with that which was a right, and in a mode which might give a future legal right to interfere with the stream when it might be wanted, or in a pecuniary point of view be useful to the riparian proprietor below.

In *Owen v. Davies* (9 W. N. 175), it was held that a Board of Health only had the ordinary right of a riparian proprietor, and was not entitled to divert water to their reservoir.

In the case of a navigable river where the tide flows and reflows, the soil in the channel of which belongs to the crown (Com. Dig. Navigation, A; *Gann v. Fishers of Whitstable*, 11 H. of Lds. 207), a riparian proprietor cannot complain of an erection in its channel, unless it causes him special damage. (*Brown v. Gugg*, 10 Jur., N. S. 525; 2 Moore, P. C., N. S. 341, a decision on the law of Lower Canada.)

He has a right to have the water flow past his land and of access to the river, and to water his cattle, and is entitled to sue if the water is fouled to the prejudice of his right, but he cannot sue on a use or interference with the river not prejudicing his rights. (*Oldaker v. Hunt*, 6 De G., M. & G. 376.) He is entitled to compensation if his access to the river is entirely taken away (*Duke of Buccleugh v. Metropolitan Board of Works*, L. R., 5 H. Lds. 418; *Metropolitan Board of Works v. McCarthy*, L. R., 7 H. Lds. 243), but not if it is merely impeded. (*Kearns v. Cordwainers Co.*, 6 C. B., N. S. 388; *Att.-Gen. v. Conservators of Thames*, 1 H. & M. 1; *Lyon v. Fishmongers Co.*, 10 W. N. 181).

In the *Att.-Gen. v. Earl of Lonsdale* (L. R., 7 Eq. 377), *Malins, V.-C.*, held that the rights of riparian proprietors on tidal and untidal rivers were the same, and that an erection in the bed of the river by one riparian proprietor was necessarily an injury to his opposite neighbour.

A person who has a customary right to water may sue for an abstraction of the water to which he is entitled without proof of actual damage. (*Harrop v. Hirst*, L. R., 4 Ex. 48.)

Conservators of a navigable river may complain of any unreasonable diversion of water to the prejudice of the navigation. As they have no

whether a single act of such perception is sufficient; or whether such perception of benefit must be continued and repeated during such a period of time as would be requisite in general to confer an easement. And whether the act, or acts, of perception give a right to claim the benefit of the entire stream, or to such an extent only as may be sufficient to continue the enjoyment already had. Whether, for instance, if a stream runs through the lands of two neighbouring proprietors, that, *per se*, gives the right to the owner of the lower land to have the stream flow on without interruption, and, consequently, to maintain an action against the proprietor above for any diversion of the water by him; or whether it is necessary that he must previously have used the water, as by

[138] means of a mill, or in some similar manner; or whether such usage must have subsisted for the time required to give an easement: and whether, if such mill requires only one half the usual supply of water of the stream, he can maintain an action for any diversion of the stream so long as sufficient water is left to turn his mill.

Even the earlier authorities seem clearly to have settled, that, if the stream be of sufficient antiquity, a single act of perception of the benefit of it is enough to give a right to the owner of the land to insist upon the stream running on in its accustomed course; at all events to such an extent as may be necessary for the continuance of such enjoyment (*l*); but although it was

(*l*) *Bealey v. Shar*, 6 East, 208; *Williams v. Morland*, 2 B. & C. 910; 4 Dowl. & R. 583.

personal interest, and only their public duty to perform, they are to be treated by the court as judges of the damage, unless the other side can show a manifest and palpable case of wilfulness in their desire to impede without doing any good to themselves. (*Att.-Gen. v. Great Eastern Railway Co.*, L. R., 6 Ch. 572.)

not then settled that the right to the flow of water in a natural stream depends, not upon antiquity of enjoyment, but is an ordinary right of property, yet, even in that state of the authorities, it is not easy to see how the single act of perception could have been supposed to give any additional force to the evidence of the antiquity of the stream, so as to make it afford a presumption of a right, supposing that the mere antiquity of the stream, unaccompanied by proof of user, would not give rise to such a presumption; and the author observed in the second edition of this work that this would seem to show, and it has since been so held in the cases already cited, that the right to the flow of water is quite independent of any such act of perception; and although it is a well-known rule of law, that an action on the case cannot be maintained for a tortious act, unless the plaintiff shows some actual damage resulting from such act to himself (*m*), and although there is authority in the books to the effect, that it is incumbent on the party complaining of the diversion of a stream, to show that he has sustained some damage thereby (*n*), and that he must show that he has already applied the stream to some useful purpose, with which the diversion interferes, yet this can not now be considered as law according to the recent authorities, in which it is decided, that every proprietor of land along the stream has, without ever having used the water, a right to maintain an action against any person who diverts it, unless the person so diverting it has acquired a legal title to do so, if the diversion diminishes the flow of water to an extent greater than that necessarily

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(*m*) *Mason v. Hill*, 3 B. & Ad.
304; 2 Nev. & M. 747.

(*n*) *Williams v. Morland*, 2 B. &
C. 910; 4 Dowl. & R. 583.

incident to the reasonable use of the water by the proprietor above in the exercise of his similar right; as, for instance, if a person erects a mill, and thereby interferes with the course of the stream to such an extent, he is liable to an action for such diversion at the suit of any proprietor of land lying lower down the stream, although the latter has never applied the water to a beneficial purpose, and brings an action only one day before the time requisite to give the owner of the mill a prescriptive right to a use of the water exceeding the natural right. And it is enough for the plaintiff, without showing actual damage, to show an injury to his right to have the flow of the water by proof that the defendant has used more of it than he is entitled to use as a riparian owner (*o*).

If the mill, or other mode of occupation of the water be ancient, no doubt ever existed upon the authorities as to the owner's right of action for any obstruction (*p*). And even the earlier decisions appear equally clear, for

[140] the more limited proposition, "That the application of a stream to any useful purpose gives a right to have the stream run on in its accustomed course, as far, at least, as is necessary for such application." In *Cox v.*

[(*o*) See ante, p. 225, the judgments in *Embrey v. Owen*, 6 Exch. 368, and *Sampson v. Hoddinott*, 1 C. B., N. S. 611, where the action was by a *reversioner*; also *Wood v. Wand*, 3 Exch. 772, and *Miner v. Gilmour*, ante, p. 226. This principle, that no actual damage need be shown to have been caused in order to sustain an action for diversion of water, applies equally to the right to a flow of water acquired by grant or user as to

the natural right; see *Northam v. Hurley*, 1 El. & Bl. 665, and *Martin, B.*, in his judgment in *Hawstron v. Taylor*, 11 Exch. 369. And it also applies to the diversion of water from an artificial watercourse, when there is a right to the flow of such water; *Rochdale Canal Company v. King*, 14 Q. B. 122.

(*p*) Comyn's Dig. Action on the Case for a Nuisance, A.

Matthews (q), it is said by Lord *Hale*, "If a man has a water-course running through his ground and erects a mill upon it, he may bring an action for diverting the stream, and not say *antiquum molendinum*; and upon the evidence it will appear whether the defendant hath ground through which the stream runs before the plaintiff's, and that he used to turn the stream as he saw cause; for otherwise he cannot justify it, though the mill be newly erected." In *Prescott v. Phillips* (r), Mr. Serjeant *Adair* ruled, "that nothing short of twenty years' undisturbed possession of water diverted from the natural channel, or raised by a weir, could give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious, and that a possession of above nineteen years, which was shown in that case, was not sufficient."

In *Bealey v. Shaw* (s), the mills and works of the plaintiff and defendants were situated on the banks of the river Irwell. The persons under whom the defendants claimed had an ancient weir across the stream, by means of which they had an easement to divert a certain quantity of water. The plaintiff erected a mill lower down, to supply which he used the portion of water which remained undisturbed by the weir. After he had continued to do so for four years, the defendants enlarged their weir, in 1791, in such a manner as to divert an additional quantity of water, to the injury of the plaintiff's mill, and for this diversion the action was brought. At the trial of the cause *Graham, B.*, considered "that

*Bealey v.
Shaw.*

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(q) 1 Ventris, 237. See also *Luttrell's case*, 4 Rep. 86.

(r) Cited in *Bealey v. Shaw*, 6 East, 213, and recognized by the

Court of K. B. in *Mason v. Hill*, 5 B. & Adol. 25; 2 Nev. & M. 747.

(s) 6 East, 208:

*Bealey v.
Sham.*

the important period for the jury to attend to, as to the question of right, was in 1791, when it was clear that an increased quantity of water had been drawn by the defendants from the river by means of the then newly enlarged and deepened sluice, before which time the plaintiff's works had been erected, and he was in the enjoyment of so much of the water as had not been before appropriated by those under whom the defendants claim; that persons possessing lands on the banks of rivers had a right to the flow of water in its natural stream, unless there existed before a right in others to enjoy or divert any part of it to their own use; that every such exclusive right was to be measured by the extent of its enjoyment, and if the defendants had in 1791 taken more water from the river than had ever been done by themselves or those under whom they claimed, after the plaintiff had appropriated what was before left for himself, by means of which his works were injured, this was a damage to him, and the continuance by the defendants, who succeeded to the premises of the sluice so deepened and enlarged, was a continuance of the injury for which the action lay." A verdict having been found for the plaintiff on this ruling, a new trial was moved for, on the ground that "the evidence of exclusive enjoyment by the defendants, and those from whom they claimed, to as much of the water as they had occasion for, increased from time to time, as more was wanted from 1794 downwards, was evidence to be left to the jury, of their exclusive right to the whole of the river water; and that any other person erecting a mill afterwards on the same stream, must take it subject to the defendants' prior right to use the whole, and could not acquire an adverse title against it under twenty

*Bealey v.
Shaw.*

years' quiet enjoyment." The before-mentioned cases of *Cox v. Matthews* and *Prescott v. Phillips* were referred to in argument. Lord *Ellenborough*, in delivering his judgment, said "I see no ground for disturbing the verdict. If the whole evidence were left to the jury, as stated by the learned judge, there can be no question upon it, and if the verdict had been for the defendants, it could not have been sustained. The general law as applied to this subject is, that, *independent of any partial enjoyment used to be had by another, every man had the right to have the advantage of a flow of water in his own land, without diminution or alteration*; but an adverse right may exist, founded on the occupation of another; and though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of various trades, yet if the occupation of the party so taking have existed for so long a time, that will raise the presumption of a grant, the other party whose land is below must take the stream subject to such adverse right. Here it appears, from 1724 downwards, there has been a partial enjoyment of the water of the river by those occupying the defendants' premises, by means of a weir of a given height, and a sluice of given dimensions. In this state of things the plaintiff, in 1787, comes to a spot lower down the stream, and erects a weir, mill and other works on his own land, and enjoys the rest of the water which the defendants had not been accustomed to divert, and this he does for four years, without objection from any person. Suppose the question had arisen then, on that enjoyment by the plaintiff, of what I may say was less than his natural right, of a right abridged by the defendants' prior occupation of a part of the river for their own purposes, what objection

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*Bealey v.
Shaw.*

could have been made to it? How could it have been shown that the occupiers of the defendants' premises were then in possession of *all* the water, when it is apparent that their use of it was not increased so as to deprive the plaintiff of the benefit of it till 1791, when they enlarged their works; and for the very purpose of appropriating to themselves more of the water, they enlarged their sluice." *Grose, J.*, added "The verdict is neither against law nor fact. The plaintiff had a right to all the water flowing over his own estate, subject only to the easement which the defendants might have in it, in respect to the premises which they occupied higher up the river. To what extent did that go? It appears, prior to the year 1791, the occupiers of the defendants' premises exercised the right of having a weir in the river of a certain height, and diverting the water from the natural channel by means of a sluice of certain dimensions. The plaintiff, on the other hand, had a right to all the water coming over that weir which had not been carried off by such sluice. Then, to 1791, the persons under whom the defendants claim converted the sluice, which was before a narrow channel, into what some of the witnesses call a canal, made both wider and deeper than before, and thereby prevented the plaintiff from taking the water in the same manner that he had done for four years before, and as he was entitled to take it. By so doing they encroached on his right, and deprived him of a benefit which was

[144] attached to his estate. It was an extension of a right before exercised by them, and a material injury to the plaintiff." *Lawrence, J.*, commenced his judgment by saying, "I think the law was very correctly stated by the learned judge at the trial." *Le Blanc, J.*, after

recognizing the ruling of the learned judge who presided at the trial, continued, "The true rule is, that after the erection of works and the appropriation by the owner of land of a certain quantity of the water flowing over it, if the proprietor of other land afterwards takes what remains, the first-mentioned owner—however he might, before such second appropriation, have taken to himself so much more—cannot do so afterwards."

*Bealey v.
Shaw.*

In the case of *Saunders v. Newman* (t), it appeared in evidence that the plaintiff's mill was built upon the site of an ancient mill which had existed on that spot for the space of at least forty years before. In 1801 this old mill was burnt down, and the plaintiff then built the present mill, with a wheel of the same dimensions and on the same level with the former one. Since that period, however, he had erected a new wheel of different dimensions, requiring less water. The level of the water, however, continued the same. It was for an injury to this last wheel that an action was brought. The declaration stated the plaintiff's possession of a water-mill, and that the defendant was possessed of another mill and mill-pond; and that the water of a certain stream from time immemorial had flowed, and still of right ought to flow, in its usual channel under the mill of the plaintiff, and from thence into the mill and mill-pond of the defendant, and from the mill and mill-pond of the defendant in its usual channel, without being penned or forced back, so as to occasion any injury to the plaintiff's mill: yet the defendant wrongfully kept and continued a hatch-dam or mill-head belonging to his mill-pond raised to a much greater height than the same

*Saunders v.
Newman.*

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(t) 1 B. & A. 258. This action was tried in 1817.

*Saunders v.
Newman.*

had theretofore been, while large quantities of the water of the stream, which ought to have flowed and escaped out of the defendant's mill-pond in its usual channel below the same mill and away from the plaintiff's mill, were greatly prevented from so flowing and escaping, and by reason of such obstruction quantities of the water and stream were penned and forced back against the wheel of the plaintiff's mill, whereby he was prevented from working it. Upon these facts, *Burrough, J.*, was of opinion, "That, as this was an action founded on the plaintiff's possession, and for an injury to that possession, and as he had not enjoyed his mill in the state in which it was when the injury was sustained for the space of twenty years, he was not entitled to recover; that if the mill had remained in the state in which it was when rebuilt in 1801, he would have been enabled to maintain his action for an injury, but he thought fit to alter it, and to make a new wheel so materially different from the former, that the evidence of his right was gone; and this being his own voluntary act, the learned judge thought that he could not maintain an action on the ground of possession, for he could only

[146] support it by a medium of proof, not that this was the same wheel, but that if the old wheel had remained the acts of the defendant would have injured him in that state." The plaintiff having been nonsuited, it was contended, on showing cause against a rule for a new trial, that the plaintiff must show a prescriptive right to the mill, and 1 Rolle, Abr. 107, pl. 16, was cited, where it was said, "If I have a mill by prescription, and another erect a new mill, and force back the water on my mill so as to do me an injury, I may have my action on the case." Lord *Ellenborough* said, in giving judg-

*Saunders v.
Newman.*

ment, "The plaintiff in this case declared that he was possessed of a mill, and that the water had been used to flow in a particular manner. Now, if by any alteration lower down the stream the water be prevented from escaping as it has usually done, and that be to the prejudice of the owner of the mill, it seems to me to form the ground of an action against the party so obstructing the water. If, indeed, the plaintiff had stated in the declaration his right to be in respect of a mill of a given construction, the result might have been different; but in the present case there must be a new trial." *Bayley, J.*, added, "I do not see how the alteration of the wheel can make any difference in this case, at least so far as to withdraw it from the consideration of the jury; it seems to me that all the allegations in the declaration were proved. The plaintiff proved that he was possessed of a mill, and that the water flowed from time immemorial in a particular channel, and that the defendant had obstructed it. The objection, therefore, if any, must be upon the record. If a person stops the current of a stream which has immemorially flowed in a given direction, and thereby prejudices another, he subjects himself to an action." [147] *Abbott, J.*, said, "When a mill has been erected upon a stream for a long period of time, it gives to the owner a right that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time: the owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that would stop all improvement in machinery. If, indeed, the alterations made from time to time prejudiced the right of the lower mill, the case would be different; but here the

*Saunders v.
Newman.*

alteration is by no means injurious. The old wheel drew more water than the new one." *Holroyd, J.*, after citing the judgment of *Le Blanc, J.*, in *Bealey v. Shaw*, continued—"The defendant, therefore, had no right to use the water in this case after the erection of the plaintiff's mill in a different manner than it had been accustomed to be used before; for at all events, by that act the plaintiff appropriated to himself the water flowing in that particular way. Now the water used to flow without the obstruction complained of. The defendant, therefore, can have no right to turn the water back upon the plaintiff's mill. The change of the wheel can make no difference, because, at the time it was done, it was certainly lawful for the plaintiff to make the alteration. Then, if that be so, the defendant by his subsequent act cannot deprive the plaintiff of an advantage which he has already lawfully acquired."

*Williams v.
Morland.*

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The case of *Williams v. Morland* (*u*) has been supposed to be somewhat at variance with the doctrine laid down in the cases already cited: but when viewed with the light thrown upon it by more recent decisions (*x*), it appears to present nothing inconsistent with the principle already laid down; though it may be conceded, that some of the expressions made use of by the learned judges in that case are rather ambiguous. The declaration in that case stated, "That the plaintiff, by reason of a dwelling-house and land, &c., enjoyed the benefit and advantage of the water of a stream, called the Lee river, which ought to flow past the premises of the plaintiff, for supplying them with water; that the defendant

(*u*) 2 B. & Cr. 910; 4 Dowl. & Ad. 583.

(*x*) See *Mason v. Hill*, 5 B. & Ad. 1; 2 Nev. & M. 747.

*Williams v.
Morland.*

erected a flood-gate, and thereby prevented the water from running and flowing in its regular course, and caused the water of the stream to run in a different direction, and with increased violence and impetuosity against the banks of the plaintiff, and undermined, washed away, damaged and destroyed them." There was a second more general count, which also charged the injury to be to the banks of the plaintiff. At the trial, before *Graham, B.*, the jury found that no damage had been done to the plaintiff's banks, but that their bad condition was caused by the plaintiff's neglect to repair them; but the jury added, that they thought the defendant should not stop the water in summer time. It was then insisted, that the plaintiff was entitled, upon this finding, to a verdict, because the defendant had stopped the water from coming to the plaintiff's premises in the summer time. But the learned judge was of opinion, that, inasmuch as the plaintiff, in his declaration, [149] did not complain that he was deprived of a supply of water, but that the natural course of the stream was altered, and that the water was caused to flow with greater impetuosity against his lands, whereby the banks were injured, and as the jury had found that the banks were not injured by such flowing of the water, the defendant was entitled to a verdict. Liberty, however, was given to the plaintiff to move to enter a verdict for him; but the rule *nisi* was discharged without hearing the defendant's counsel.

The true ground of the decision of the Court of King's Bench in this case appears to be that taken by the learned judge at *nisi prius*, viz. that the action was brought without reference to any easement at all, for an alleged wrongful act of the defendant in throwing back

*Williams v.
Morland.*

water on the plaintiff's land, and injuring his banks; a ground of action that totally failed in proof(y). The observations of the learned judges, as to the general law of flowing water, were totally uncalled for by the question then before the court. "Flowing water," said *Bayley, J.*, "is originally *publici juris*; so soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriated it; subject to that right all the rest of the water remains *publici juris*."

*Liggins v.
Inge.*

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In *Liggins v. Inge* (z), already cited, the precise question now treated of did not arise: the original right of the plaintiff to the flowing water was not denied, and the case turned entirely on the effect of a parol license. In the judgments in *Williams v. Morland*, as well as in *Liggins v. Inge*, there are dicta to the effect, "that, by the law of England, the possessor who first appropriates any part of water flowing through his land to his own use, has a right to the use of so much as he then appropriates against any other:" but more recent decisions, in which all the authorities have been elaborately reviewed and considered, have established that this position is correct only if taken with the qualification, "that, by such appropriation, no greater right is claimed than to a flow of water in its usual and accustomed course;" it being clearly settled, that no appropriation, except for such a period as will confer an easement, can diminish the natural rights of other parties possessing lands along the course of the stream.

(y) See per Curiam in *Mason v. Hill*, 5 B. & Ad. 20; 2 Nev. & M. 747. (z) 7 Bing. 682; 5 Moo. & P. 712.

“The right to the use of water,” said Sir *J. Leach*, in *Wright v. Howard* (a), “rests upon clear and settled principles; *primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, or throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years.” The learned judge then added, “that an action will lie at any time within twenty years where injury happens to arise in consequence of the new purpose of the party to avail himself of his common right” (b).

*Wright v.
Howard.*

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The case of *Mason v. Hill* (c), which may be considered as having settled the law on this point (d), came twice before the Court of King’s Bench, and on both occasions elaborate judgments were pronounced, both

Mason v. Hill.

(a) 1 Sim. & Stuart, 190.

Marquis of Breadalbane, 3 Bligh,

(b) *Rex v. Trafford*, 1 B. & Ad.

N. S. 414.

874; S. C. in error, 8 Bing. 204;

(c) 3 B. & Ad. 304; 5 B. & A.J.

1 Moo. & Scott, 401; 2 Cr. & J.

1; 2 M. & Nev. 747.

265; which appears to have been compromised; *Menzies v. Tho*

[(d) See judgment in *Embrey v. Owen*, 6 Ex. 369, acc.]

Mason v. Hill. fully sanctioning the principle, “that if the owner of land adjoining a stream has once appropriated the water to a beneficial purpose, he may maintain an action against any person diverting it from its usual course, though such diversion be the continuation of an act done previous to that beneficial appropriation on his part, provided such diversion has not continued for a sufficient length of time to confer an easement.”

[152] The declaration stated, “that the plaintiff was lawfully possessed of a small manufactory and premises, and by reason thereof ought to have had and enjoyed the benefit and advantage of the water of a certain stream, which had been used to run and flow, and of right ought still to run and flow, to his mill, &c., in great purity and plenty, to supply the same with water for working, using and enjoying the same, and for other necessary purposes; that the defendants, by a certain dam and obstructions across the stream above the plaintiff’s premises, impounded, penned back, and stopped the water, and by pipes, stiles, &c., diverted it from the plaintiff’s premises, and prevented it from flowing along the usual and proper course; and further, that the defendants injuriously heated, corrupted, and spoiled the water, so that it became of no use to the plaintiff, whereby he was prevented from using his mill and premises in so extensive and beneficial a manner as he otherwise would have done.” At the trial before *Bosanquet, J.*, the following appeared to be the facts of the case. The plaintiff and the defendants had land contiguous to the stream; the land of the defendants being situate on a part of the stream above the land of the plaintiff. The stream acted as a sewer to part of the town of Newcastle-under-Lyne, and the water was consequently foul and muddy; it had

been unprofitable to both parties until it was diverted by the defendants: this diversion took place in 1818, by the defendants erecting a weir or dam across the stream at the part contiguous to their own land. By means of this weir, and of channels and reservoirs made in their land, great part of the water was conveyed to certain buildings belonging to them at some distance from the weir, and there used as part of the supply of water necessary for a steam engine. About ten years after this diversion, the plaintiff made a channel in his land contiguous to the stream, for conveying the water to some buildings belonging to him at a little distance from the stream, for the purpose of some process of manufacture not previously carried on there. Some attempts at accommodation between the parties took place, but were ineffectual or unsatisfactory, and therefore the action was brought: the plaintiff's works were occasionally suspended for want of the water diverted by the defendants, and which, after it had been used by them, was suffered to pass away into a level below the plaintiff's works. [153]

It was contended on the part of the defendants, that as they had first appropriated the use of the water in the sewer to beneficial purposes without injuring the plaintiff, they had acquired a right thereto, and were not answerable for the diversion; and *Williams v. Morland* was cited. The learned judge acting upon that authority directed the jury to find a verdict for the defendants.

In the ensuing term a rule was obtained for a new trial, on the ground that the defendants, who had diverted the water, could acquire no right to have it flow in its new channel by mere appropriation without twenty years' unmolested enjoyment. Cause having been shown

Mason v. Hill. against the rule, the court took time to consider their judgment, which was afterwards declared by Lord *Tenterden*. After stating the facts of the case, his lordship proceeded, "In this state of things the present action was brought; and for the defendants it was insisted, that they, having first appropriated the water beneficially to their use, at a time when the appropriation was not in-

[154] jurious to the plaintiff, had a right to the water and to the use of it, notwithstanding the diversion had, by subsequent acts of the plaintiff, become injurious to him. The plaintiff, on the other hand, insisted that the defendants did not, nor could by law, acquire a right to the water by a diversion and enjoyment for a period short of twenty years. The several decisions and dicta of learned judges on this subject were quoted at the bar, and need not be repeated. It appears to have been held that a person could not complain of a diversion or obstruction of water, from which, at the time of his complaint, he suffered nothing; which seems to have been on the ground, that in such a case it was *injuria sine damno*. It is not now necessary to say whether such a principle should be admitted. The only decision upon a question like that in the present case, is the judgment of the present Master of the Rolls, then Vice-Chancellor, in the case of *Wright v. Howard* (e). This judgment is expressed in language so perspicuous and comprehensive, that I shall here quote it."

His lordship then cited the judgment of the Master of the Rolls as above given (f), and concluded by saying, "We all agree in the judgment thus delivered; and upon the authority of that decision and the reasoning of the learned judge, we are of opinion, that the de-

(e) 1 Sim. & Stu. 190.

(f) Ante, p. 243.

defendants did not acquire a right by their appropriation against the use which the plaintiff afterwards sought to make of the water ; and consequently the rule for a new trial must be made absolute.” Mason v. Hill.

On the second trial the jury found a special verdict, the substance of which is set out in the judgment of the court, which was delivered by Lord *Denman*, C. J., [155] after time had been taken by the court to consider. After stating the pleadings, his lordship proceeded as follows:—

“ The substance of the special verdict is this: The defendant’s mill was erected in 1818 ; the plaintiff’s in 1823, on a piece of land, the former owner and occupier of which had, for twenty years prior to 1818, appropriated the water of the stream and springs for watering his cattle and irrigating that land.

“ At the time when the defendant’s mill was erected, the then owner and occupier of the plaintiff’s land gave a parol license to the defendants to make a dam at a particular place above, where the *Sitchwell Tree* stood, and to take what water they pleased *from that point* to their mill, which water was so taken, and returned by pipes into the stream, above the spot where the plaintiff’s mill was afterwards erected.

“ In 1818, the defendants conducted part of the water of the *Over Canal Springs*, which had before flowed into the stream, into a reservoir for the use of their mill.

“ After the plaintiff erected his mill, namely, in 1828, he appropriated to its use all the surplus water, viz. that which flowed over and through the dam ; that from the *Over Canal Springs*, which was not conducted into the reservoir ; and all from the *Sitchwell Spring* (which

Mason v. Hill. was another feeder of the brook); and also that which was returned by the defendants into the stream.

[156] “ In January, 1829, the plaintiff demolished the dam at the *Sitchwell Spring*. The defendants erected a new dam lower down, and by means of it diverted from the plaintiff’s mill, at some times, *all* the stream, including all the water so appropriated; at others, a part of it, and returned the remainder in a heated state into the stream.

“ And the questions upon this special verdict are,—

“ Whether the plaintiff is entitled to recover for the diversion of the whole water of the stream, or of any and what part of it, or for the heating of the part returned?

“ That the plaintiff has a right to a verdict for the injury sustained by the abstraction *of the whole of the surplus water*, and by the abstraction of part and the heating of the remainder of that surplus water, does not admit of the least doubt. In any view of the law on this subject,—whether the right to the use of flowing water be in the first occupant, as the defendants allege, or in the possessor of the land through which it flows in its natural course, as is contended on the other side,—the plaintiff was entitled to this surplus, for he filled both characters; he was the first occupant of it, and the owner and occupier of the land through which it flowed. In this respect the case is exactly like that of *Bealey v. Shaw* (g).

“ The learned counsel for the defendants argued, that inasmuch as the plaintiff pulled down the dam at the *Sitchwell Tree*, in consequence of which the new dam was erected, he must be considered as the author of the

mischief, and has no right to complain of it. It is, Mason v. Hill, however, quite impossible to sustain such a position. If the plaintiff committed a wrongful act in demolishing the dam, the defendants might have restored it, or brought an action; they had no right to construct another at a different place, and by means of it abstract more water than the other did. [157]

“ The remaining questions are, whether the plaintiff can recover, in respect of the abstracting, or the injury by heating, of that portion of water which was before diverted by the license of the then owner and occupier of the plaintiff's field; and, secondly, in respect of that portion of the *Over Canal Springs* which was conveyed in 1818 to the defendants' reservoir; both of which portions have been at one time entirely, and at another partially abstracted, and in the latter case returned in a heated state into the brook; and we are of opinion that the plaintiff is entitled to recover in respect of both.

“ As to the first of these portions, the defendants contend that the plaintiff has no right of action, because the former owner and occupier of his land gave an irrevocable license by parol to the defendants to divert so much water by the *Sitchwell Tree Dam*: and to prove that a parol license to divert water, which had been acted upon by the person to whom it was given, and expense incurred in consequence, is irrevocable, the case of *Liggins v. Inge* (*h*) was cited. But, admitting that the license to abstract the water at that particular point, and by means of that dam, was irrevocable, and therefore that the plaintiff was a wrongdoer in pulling the dam down, it by no means follows that the plaintiff

Mason v. Hill. is not to recover for an equal portion of water abstracted
 [158] at a different place. In the first place, the license is not general to take away *at any point*, but at *this* only; and in the second place, if the license had been general, to take away *at any place*, it would have been clearly revocable, except as to such places where it had been acted upon, and expense incurred (for it is on that ground only that such a license can be irrevocable); and as it was revoked before the last dam was erected, the defendants could not justify the abstraction of any portion of the water by virtue of the license at such dam.

“The last question is, whether the plaintiff ought to recover in respect of that portion of the water which was diverted from the *Over Canal Springs*, and collected in a tank in 1818. This was taken without license, and appropriated by the defendants to the use of their mills before any other appropriation, but has not been so appropriated for twenty years; and the point to be decided is, whether the defendants, by so doing, acquired any right to this against the plaintiff, through whose field it would otherwise have flowed in its natural course; and we are of opinion that they did not.

“This point might, perhaps, be disposed of in favour of the plaintiff, even admitting the law to be as contended for by the defendants, that the first occupant acquires a right to flowing water; for, by this special verdict, all the water of the brook is found to have been appropriated by Ashley the father, and used for twenty years up to the year 1818, for watering his cattle and irrigating the field now the plaintiff’s. A right to use the water, thus acquired by occupancy, in right of the field, must have
 [159] passed to the plaintiff, and could not be lost by mere

non-user from 1819 to 1829; and the total or partial abstraction of the water may be an injury to such a right in point of law, though no actual damage is found by the jury to have been sustained in that respect. But we do not wish to rest a judgment for the plaintiff on this narrow ground. We think it much better to discuss, and, as far as we are able, to settle the principle on which rights of this nature depend. *Mason v. Hill.*

“The proposition for which the plaintiff contends is, that the possessor of land, through which a natural stream runs, has a right to the advantages of that stream flowing in its natural course, and to use it when he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above and below—that neither can any proprietor above diminish the quantity, or injure the quality of water, which would otherwise descend, nor can any proprietor below throw back the water without his license or grant:—and that, whether the loss, by diversion, of the general benefit of such a stream be or be not such an injury in point of law, as to sustain an action without some special damage, yet, as soon as the proprietor of the land has applied it to some purpose of utility, or is prevented from so doing by the diversion, he has a right of action against the person diverting.

“The proposition of the defendants is, that the right to flowing water is *publici juris*, and that the first person who can get possession of the stream, and apply it to a useful purpose, has a good title to it against all the world, *including* the proprietor of the land below, who has no right of action against him, unless such proprietor [160] has already applied the stream to some useful purpose also, with which the diversion interferes; and, in default

Mason v. Hill. of his having done so, may altogether deprive him of the benefit of the water.

“In deciding this question, we might content ourselves by referring to, and relying on, the judgment of this court in this case, on the motion for a new trial (i); but as the point is of importance, and the form in which it is now again presented to us leads to a belief that it will be carried to a court of error, we think it right to give the reasons for our judgment more at large.”

“The position, that the first occupant of running water for a beneficial purpose has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrong-doer; and the owner of the land who applies the stream that runs through it to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill. *The Earl of Rutland v. Bowler* (j). But it is a very different question, whether he can take away from the owner of the land below one of its natural advantages, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied, and deprive him of it altogether by anticipating him in its application to a useful purpose. If this be so, a considerable part of the value of an estate, which, in manufacturing districts particularly, is much enhanced by the existence of an unappropriated stream of water with a fall within its limits, might at any time be taken away; and, by parity of reasoning, a valuable mineral or brine

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(i) 3 B. & Ad. 304.

(j) Palmer, 290.

spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another. *Mason v. Hill*

“ We think that this proposition has originated in a mistaken view of the principles laid down in the decided cases of *Bealey v. Shaw* (*k*), *Saunders v. Newman* (*l*), *Williams v. Morland* (*m*). It appears to us also, that the doctrine of Blackstone and the dicta of learned judges, both in some of those cases and in that of *Cox v. Matthews* (*n*), have been misconceived.

“ In the case of *Bealey v. Shaw*, the point decided was, that the owner of land through which a natural stream ran, (which was diminished in quantity by having been in part appropriated to the use of works above, for twenty years and more, without objection,) might, after erecting a mill on his own land, maintain an action against the proprietor of those works, for an injury to that mill, by a further subsequent diversion of the water. This decision is in exact accordance with the proposition contended for by the plaintiff, that the owner of the land *through which* the stream flows, may, as soon as he has converted it to a purpose producing benefit to himself, maintain an action against the owner of the land above, for a subsequent act, by which that benefit [162] is diminished, and it does not in any degree support the position, that the first occupant of a stream of water has a right to it *against* the proprietor of land below. Lord *Ellenborough* distinctly lays down the rule of law to be, that, ‘ independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water *in his own land*, without diminution or alteration. But an adverse right

(*k*) 6 East, 208.

(*l*) 1 B. & A. 258.

(*m*) 2 B. & C. 910.

(*n*) 1 Ventr. 237.

Mason v. Hill. may exist, founded on the occupation of another; and though the stream be either diminished in quantity or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it have existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream, subject to such adverse right.' Mr. Justice *Lawrence* confirms the opinion of Mr. Baron *Graham* on the trial, that 'persons possessing lands on the banks of rivers had a right to the flow of the water in its natural stream, unless there existed before a right in others to enjoy or divert any part of it to their own use.' Mr. Justice *Le Blanc* in his judgment, says as follows:—'The true rule is, that, after the erection of works, and the appropriation, by the owner of land, of a certain quantity of the water flowing over it, if a proprietor of other land afterwards takes what remains, the first-mentioned owner, *however he might, before such second appropriation, have taken to himself so much more*, cannot do so afterwards;' and this expression, in which, in truth, that learned judge cannot be considered as giving any opinion upon the effect of a prior appropriation, is the only part of the case which

[163] has any tendency to support the doctrine contended for by the defendants.

"The case of *Saunders v. Newman* (o) is no authority upon this question, and is cited only to show, that Mr. Justice *Holroyd* quotes the opinion of *Le Blanc*, J., above mentioned; and he confirms it, so far as this, that the plaintiff, by erecting his new mill, appropriated to himself the water in its then state, and had a right of

action for any subsequent alteration, to the prejudice of his mill; about which there is no question. Mason v. Hill.

“The last and principal authority cited is that of *Williams v. Morland* (p).

“The case itself decides no more than this: that the plaintiff, having in his declaration complained that the defendants had, by a flood-gate across the stream above, prevented the water from running in its regular course through the plaintiff’s land, and caused it to flow with increased force and impetuosity, and thereby undermined and damaged the plaintiff’s banks, could not recover, the jury having found that no *such* damage was sustained. The judgments of all the judges proceed upon this ground; though there are some observations made by my brother *Bayley*, which would seem at first sight to favour the proposition contended for by the defendants.

“These observations are, that ‘flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right, all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public. Now, if this be the true character of the right to water, a party complaining of the breach of such right ought to show that he is prevented from having water which he has *acquired* a right to use for some beneficial purpose’ (q). [164]

“The dictum of Lord Chief Justice *Tindal* in *Liggins v. Inge* (r) is to this effect:—‘Water flowing in a

(p) 2 B. & C. 910.

(q) 2 B. & C. 913.

(r) 7 Bing. 692.

Mason v. Hill. stream, it is well settled by the law of *England*, is *publici juris*. By the *Roman* law, running water, light, and air, were considered as some of those things which were *res communes*, and which were defined, things, the property of which belongs to no person, but the use to all. And by the law of *England*, the person who first appropriates any part of this water *flowing through his land* to his own use, has the right to the use of so much as he then appropriates, against *any other* ;* and for that he cites *Bealey v. Shaw and others* (s), which case, however, is no authority for this position, as far as relates to the owner of the land below ; and probably, therefore, the Lord Chief Justice intended the expression ‘any other’ to apply only to those who diverted or obstructed the stream. To these dicta may be added the passage from Blackstone’s *Commentaries*, vol. ii. p. 14 :—‘ There are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had ; and therefore they still belong to the first occupant,

[165] during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences : such, also, are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition, which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance ; but if once they escape from his custody, or he voluntarily abandons the

(*) 6 East, 280.

use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.’ Mason v. Hill.

“And, 2 Blackstone’s Commentaries, p. 18. ‘Water is a movèable wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein; wherefore if a body of water runs out of my pond into another man’s, I have no right to reclaim it.’

“None of these dicta, when properly understood with reference to the cases in which they were cited, and the original authorities in the Roman law, from which the position that water is *publici juris* is deduced, ought to be considered as authorities, that the first occupier or first person who chooses to appropriate a natural stream to a useful purpose, has a title against the owner of land below, and may deprive him of the benefit of the natural flow of water.

“The *Roman* law is (2 Inst. tit. 1, s. 1) as follows:—
 ‘Et quidem naturali jure, communia sunt omnium hæc: aer, aqua profluens, et mare, et per hoc littora maris.’ [166]
 It is worthy of remark that Fleta, enumerating the *res communes*, omits ‘aqua profluens,’ Lib. iii. ch. 1. Vin-
 nius, in his commentary on the Institutes, explains the meaning of the text,—‘*Communia sunt, quæ, a naturâ ad omnium usum prodita, in nullius adhuc ditionem aut dominium pervenerunt: Huc pertinent præcipue aer et mare, quæ cum propter immensitatem, tum propter usum, quem in commune omnibus debent, jure gentium divisa non sunt, sed relictæ in suo jure et esse primævo, ideoque nec dividi potuerunt. Item aqua profluens, hoc est aqua jugis, quæ vel ab imbribus collecta, vel e venis terræ scaturiens, perpetuum fluxum agit, flumenque aut*

Mason v. Hill. rivum perennem facit. Postremò propter mare, etiam littora maris. In hisce rebus duo sunt, quæ jure naturali omnibus competunt. Primum communis omnium est harum rerum usus, ad quem naturâ comparatæ sunt: tum siquid earum rerum per naturam occupari potest, id eatenùs occupantis fit, quatenùs eâ occupatione usus ille promiscuus non læditur.' And he proceeds to describe the use of water, '*aqua profluens ad lavandum et potandum unicuique jure naturali concessa.*'

"The law as to rivers is, '*flumina autem omnia et portus publica sunt, ideoque jus piscandi omnibus commune est in portu fluminibusque.*' And Vinnius, in his commentary on this last passage, says, '*unicuique licet in flumine publico navigare et piscari.*' And he proceeds to distinguish between a river and its water: the former being, as it were, a perpetual body, and under the dominion of those in whose territories it is contained; the latter being continually changing, and incapable, whilst it is there, of becoming the subject of property, like the air and sea.

[167] "In the Digest, book 43, tit. 13, in public rivers, whether navigable *or not*, it appears that every one was forbidden to lower the water or narrow the course of the stream, or in any way to alter it, to the prejudice of those who dwelt near. Tit. 12 distinguishes between public and private rivers; and in section 4, it is said, that private rivers in no way differ from any other private place.

"From these authorities, it seems that the *Roman* law considered running water, not as a *bonum vacans* in which any one might acquire a property; but as public or common, *in this sense only*, that all might drink it, or apply it to the necessary purposes of supporting life;

mill on the banks of the dried-up stream, or drive his cattle there to water, at any time before the disturbing party had acquired an easement; but, as it is conceded that "deterioration of the value of the premises" (*f*) is sufficient to confer a right of action, it is scarcely possible to imagine a case, in which the diversion of a running stream of water would not be attended with the result of diminishing the value of the land through which it flows (*g*).

What interference with water actionable.

Independently, however, of this view of the case, and assuming that no actual damage is shown to arise from the diversion, an action may be maintained for it, on the ground that the undisturbed continuation of such acts, without the express consent of the owner of the land, would be evidence of a right to do them (*h*).

In *Ashby v. White* (*i*), Lord Holt says, "Every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage where a man is thereby hindered of his right." After adverting to some cases of trespass, such as a cuff on the ear, though it cost the receiver nothing, "not so much as a little diachylon," he further says, "In these cases the action is brought vi et armis. But for invasion of another's franchise, trespass vi et armis does not lie, but an action of trespass on the case; as where a man

(*f*) Per Holroyd, J., in *Williams v. Morland*, 2 B. & Cr. 916.

(*g*) See *Fay v. Prentice*, 1 C. B. 828, [and *Beaton v. Weate*, 5 E. & B. 986.]

(*h*) *Young v. Spencer*, 10 B. & C. 145; *Baxter v. Taylor*, 4 B. &

Ad. 72; *Hopwood v. Scholfield*, 2 M. & Rob. 34. [See judgment of Coleridge, J., *Rochdale Canal Company v. King*, 14 Q. B. 135, and judgment, *Wood v. Waud*, 3 Exch. 772.]

(*i*) 2 Ld. Raym. 955.

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has *retorna brevium*, he shall have an action against any one who enters and invades his franchise though he lose nothing by it."

This doctrine was fully recognized by *Parke, B.*, in delivering the judgment of the Court of Exchequer in *Williams v. Mostyn (k)*. In this case, however, it was not essential to decide that point, because the court held that the plaintiff had failed to show any right that had been violated.

In *Ashby v. White* it is very well known the judgment was arrested against the opinion of Lord Holt, but this judgment of the majority was reversed in the House of Lords. This reversal gave rise to a furious controversy between the two Houses of Parliament, and the Lords appointed a committee, to be assisted by the Lord Chief Justice of the Queen's Bench and the Lord Chief Baron, to report on the state of the case (*l*). This report (*m*) is an elaborate argument in support of the reversal: Lord Holt is said to have had the principal share in its production. The same doctrine is repeated in it. "It was said in arguing this case, that the plaintiff had no damage, or at least that there was no such injury or damage done to him as would support an action. The answer to that is, that the law will never imagine any such thing as *injuria sine damno*; every injury imports damage in the nature of it."

"Wherever any act," says Mr. Serjeant Williams, "injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be

(*k*) 4 M. & W. 153.

(*l*) Journ. H. L. 27th Mar. 1704-5, p. 527.

(*m*) Idem. It is set out ver-

batim in the author's edition of Lord Raym. in a note to *Ashby v. White*.

maintained for an invasion of the right without proof of any specific injury, and this seems to be a governing principle in cases of this kind. As in the case of *Patrick v. Greenway*, tried before *Lawrence, J.*, at Oxford Spring Assizes, 1796, which was an action of trespass for fishing in the plaintiff's several fishery, it appeared in evidence that the defendant fished there, but did not take any fish, neither was it alleged in the declaration that the defendant caught any fish. The plaintiff obtained a verdict, which, in the following term, Easter, 1796, the defendant moved to set aside; but the Court of Common Pleas refused even a rule to show cause, upon the ground that the act of fishing was not only an infringement of the plaintiff's right, but would hereafter be evidence of the using and exercising of the right by the defendant, if such an act were overlooked" (n).

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In the American Courts this point has been decided; it has there also been held, "that no previous appropriation by the act of man is requisite to give a right of action for diverting a stream from its natural course" (o).

Per Curiam, "A mill privilege, not yet occupied, is valuable for the purpose to which it may be applied. It is a property which no one can have a legal right to impair or destroy, by diverting from it the natural flow of the stream upon which its value depends; although it may be impaired by the exercise of certain lawful rights originating in prior occupancy. If an unlawful diversion

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(n) 1 Wins. Saund. 346 b, note to *Mellor v. Spateman*; 1 Notes to Saund. 626. See note (f) to edit. 1845. 1 Notes to Saund. 627, note (n).

(o) *Blanchard and another*, plaintiffs in error, v. *Baker and another*, 1832, 8 Greenleaf's Reports in the Supreme Court of Maine.

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is suffered for twenty years, it ripens into a right, which cannot be controverted. If the party injured cannot be allowed in the meantime to vindicate his right by action, it would depend upon the will of others, whether he should be permitted or not to enjoy that species of property."

The court cited the case of *Hobson v. Todd* (*p*), in which, in an action brought by a commoner who had himself surcharged against another commoner for putting his beasts on the common, it was held he might recover: and it being objected that the plaintiff had shown no damage, *Buller, J.*, said, "There is also another ground on which this action may be supported, which is, that the right has been injured; and if a commoner cannot bring such an action as this, because his cattle had grass enough to prevent them from starving, he must permit a wrong-doer, like the defendant, to gain a right by the length of possession."

This doctrine of *Buller, J.*, was commented on and recognized as law by *Grose, J.*, in *Pindar v. Wadsworth*, (*q*), and is consistent with the judgment of the Court of Common Pleas in a recent important case (*r*).

[174] The correctness of the principle laid down by *Buller, J.*, has been questioned, but only on the ground of its applicability to the particular case then before the court—as an action might, at all events, have been maintained by the lord, and the acquisition of a title by the wrong-doer thus prevented; and that to allow such an action by a commoner, without special damage, would tend to a multiplicity of suits. "The law," says Mr. Serjeant Williams, citing the cases of *Hobson v. Todd* and *Pindar*

(*p*) 4 T. R. 71.
(*q*) 2 East, 161.

(*r*) *Bower v. Hill*, 1 Bing. N. C. 555; S. C. 2 Scott, 540.

v. Wadsworth, "considers the right of the commoner as injured by such an act, and therefore allows him to bring an action for it, to prevent a wrong-doer from gaining a right by repeated acts of encroachment (*s*).

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[These points may, however, now be considered as settled according to the judgments already referred to, which confirm the views of the author expressed in the second edition, that no act of appropriation is necessary, and that no actual damage need be shown if the right to the flow of the stream in its natural state be infringed by a use of it beyond that which every riparian owner is entitled to (*t*).

(*s*) 1 Wms. Saund. 346 a, note; 1 Notes to Saund. 626, and judgment in *Wood v. Waul*, 3 Exch. 772, 773.

[(*t*) *Embrey v. Owen*, 6 Exch. 353; *Sampson v. Hoddinott*, 1 C. B., N. S. 590. See also the judgments cited *supra*, p. 225, and in *Wood v. Waul*, 3 Exch. 772, 773, and *Coleridge, J.*, in *Rockdale Canal Company v. King*, 14 Q. B. 135. The question, what is a lawful user of the water by each riparian owner in the exercise of his natural right, depends upon the circumstances of each case; as the extent to which the enjoyment of, or power to enjoy, the flow of the stream by other riparian owners may be affected by the acts of one, depends upon the size of the stream, the velocity of the current, the nature of the soil, and a variety of other facts. It is entirely a question of degree, and it is impossible to define precisely the limits which separate the permitted use of the stream from

its wrongful application. (See the judgments in *Embrey v. Owen*, 6 Exch. 371—373, in which case the question was, whether the defendant had infringed the plaintiff's right by using the water for irrigation: *Sampson v. Hoddinott*, 1 C. B., N. S. 611, 612, in which the question was as to the right to impede the flow by occasionally shutting sluices: and the case put by *Coleridge, J.*, in *Chesmore v. Richards*, 2 H. & N. 190, of a man *exhausting* the running water by irrigation, which would be clearly illegal, though the abstraction of the same amount of water from a large river might have been perfectly legal.) The question in each case should seem to be, is the user such as to affect the natural flow of the water of the stream to an extent greater than that which is necessarily incident to the common enjoyment of the stream by all the riparian owners? If it be, then it may be made the subject of an action by

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The natural right to the flow of water applies, however; only to water flowing in some defined natural channel; and therefore the owner of land upon which there is surface water rising out of springy or boggy ground and flowing in no definite channel, or water rising occasionally at one spot, but having no defined course, has a right to get rid of such water by draining the land or in any way he pleases, although, if not so disposed of, it might ultimately have reached the course of a natural stream (*u*).

The court laid down that the right of the riparian owner to the natural flow of water cannot extend further than the right to the flow of the stream itself and to the water flowing in some *defined* natural channel, either subterranean or on the surface, communicating directly with the stream itself; and in *Broadbent v. Rambotham* (*x*), the owner of the soil was held not to be liable to an action for draining a pond, the water of which occasionally, when it exceeded a certain depth, escaped and squandered itself over the surface, some of it augmenting a natural stream, but by no defined channel; and see also the case of *Chasemore v. Richards* (*y*), which confirms these authorities.

On the other hand it was decided in *Dudden v. Guardians of the Clutton Union* (*z*), that where the source of a stream is a natural spring, rising out of the ground in a continuous flow and passing away in a

any owner whose actual use of or power to use the water is affected by it. The question can only arise in practice with reference to some extraordinary use of the water; the distinction between which and its

ordinary uses is pointed out, p. 226, note (*k*).

(*u*) *Ramstron v. Taylor*, 11 Exch. 369.

(*x*) 11 Exch. 602.

(*y*) Cited post, p. 287.

(*z*) 1 H. & N. 627.]

natural channel, a diversion of such stream, by sinking a tank at the fountain-head and so collecting the water there and leading it away, is equally actionable with a diversion in any other part of the channel, the defined channel commencing at the very source (*a*).] *

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By the Civil Law a servitude of water flowing in its accustomed course might be obtained by the enjoyment of a stream of water during the requisite period; and although originally no such right could be valid, unless binding upon the owner of the land in which the spring rose, yet this rule was afterwards relaxed (*b*). Such a servitude appears to have been valid if the water increased the value of the dominant estate, or was capable

Civil law. Servitudes in water.

[(*a*) Upon the question of fact, what is water flowing in a defined natural channel, see the case of *Ennor v. Barnwell*, V.-C. S., 6 Jur., N. S. 1233; 2 Giff. 410; on appeal, 1 De G., F. & J. 529; 7 Jur., N. S. 788; and see the observations on that case, post, p. 286.]

(*b*) Servitus aquæ ducendæ vel

hauriendæ, nisi ex capite vel ex fonte, constitui non potest; hodie tamen ex quocunque loco constitui solet.—L. 9, ff. De serv. præd. rust.

Si aquam per possessionem Martialis eo sciente duxisti, servitutem exemplo rerum immobilium tempore quasisti.—C. L. 2, ff. De serv. et aquâ.

* "Their Lordships have not before them the particular texts of Voet, upon which all the judges seem to concur in holding that if the streams do rise in the appellant's land he is by the law of the colony entitled to do what he pleases with their waters. Their Lordships are not satisfied that this proposition is true without qualification; or that by the Roman Dutch law, as by the law of England, the rights of the lower proprietors would not attach upon water which had once flowed beyond the appellant's land in a known and definite channel, even though it had its source within that land." (*Van Breda v. Silberbaur*, L. R., 3 P. C. 99.)

of being appropriated to a purpose of utility (*c*), or even of pleasure (*d*).

[175] It has been already seen, with regard to running water, that every proprietor on its banks has a right to claim that the stream should run on in its accustomed course. This applies as well to the right to discharge the water as to receive it.

Easements.

In addition to the natural right to receive flowing water in its accustomed course—easements of an affirmative nature, the object of which is to interfere with the natural course of the stream, may be acquired by user over a stream flowing through a man's land or through his neighbour's land (*e*). Thus a right may be acquired to throw back upon the land of proprietors higher up the stream, the water which, unless so reflected, would, by the force of gravity, pass from it; or to discharge the water upon the land lying lower down the stream, either injured in quality, or with a degree of force greater or less than the natural current (*f*).

(*c*) Si manifestè doceri possit jus aquæ ex vetere more atque observatione per certa loca profluentis utilitatem certis fundis irrigandi causâ exhibere; procurator noster ne quid contra veterem (formam) atque solemnem morem innovetur, providebit.—Ibid. L. 7.

Iabeo scribit, etiam si Prætor hoc interdicto de aquis frigidis sentiat: tamen de calidis aquis interdicta non esse deneganda. Namque harum quoque aquarum usum esse necessarium; nonnumquam enim refrigeratæ usum irrigandis agris præstant: his accedit, quod in quibusdam locis, et quum

calidæ sunt, irrigandis tamen agris necessariae sunt—ut Hierapoli: constat enim apud Hierapolitanos in Asiâ agrum aquâ calidâ rigari. Et quamvis ea sit aqua, quæ ad rigandos non sit necessaria, tamen nemo ambiget his interdictis locum fore.—L. 1, § 13, ff. De aquâ quot. et aest.

(*d*) Hoc jure utimur ut etiam non ad irrigandum, sed pecoris causâ vel amœnitatis, aqua duci possit.—L. 3, ibid.

[(*e*) See judgment in *Sampson v. Hoddinott*, 1 C. B., N. S. 611.]

[(*f*) But in order to acquire a right to use or to affect the water in

The right claimed by the defendant in *Saunders v. Newman*, already cited, is an instance of the former class of affirmative easements (*g*).

In *Wright v. Williams* (*h*), it was held that a right to let off upon the neighbouring land water which had been used for the precipitation of minerals, and was

a manner not justified by natural right, so as to abridge the natural rights of the other riparian owners to the use of the stream, it must be shown that the user relied upon was such as to affect either the actual use that those other owners have made of the stream, or their power to use it (if so minded), so as to raise the presumption of a grant, and so render the tenements of those other owners servient tenements: *Nampson v. Hoddinott*, ub. sup., where it is laid down by the court, that all persons having lands on the margin of a flowing stream have, by nature, certain rights to use the water of that stream, whether they exercise those rights or not; and they may begin to exercise them whenever they will. By usage they may acquire a right to use the water in a manner not justified by their natural rights; but such acquired right has no operation against the natural rights of other landowners on the stream, unless the user by which it was acquired affects the use that they have made of the stream or their power to use it, so as to raise the presumption of a grant, and so render their tenements servient tenements. The same rules apply whether the right claimed is to affect the quantity,

the quality or the velocity of the water; and the period and all other requisites of the user are like those of all other affirmative easements, and have been already discussed.]

(*g*) Ante, p. 237; 1 B. & A. 258. [*Beeston v. Weate*, 5 El. & Bl. 986, is an instance of a right so acquired by the owners of the dominant tenement to go from time to time upon the servient tenement, for the purpose of diverting the water of a natural stream flowing along it, so as to cause it to pass through that tenement by an artificial cut to the dominant tenement, for the purpose of supplying cattle with water. In that case the right claimed was not to the continual flow of the water, and in that respect it differs from the ordinary case of the owner of a mill not upon the bank of a river, who has acquired by user the right to divert the river to his mill by an artificial cut through a neighbour's land. The use of artificial aids, as mill leats, &c., by a riparian owner, does not in any way affect his natural right to the use of the water. If the rights of other proprietors are not infringed thereby, he may employ such means as he thinks proper.]

(*h*) 1 M. & W. 77.

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thereby rendered noxious, was an easement, and might be acquired, like any other easement, by user (*i*).

[176] Though every one in building is bound so to construct his house as not to overhang his neighbour's property, and construct his roof in such a manner as not to throw the rain water upon the neighbouring land (*j*), yet there appears to be authority in our law for the position, that a man may acquire a right, by user, to project his wall or caves over the boundary line of his property, or dis-

[*i*] And in *Carlyon v. Lovering*, 1 H. & N. 797, the Court of Exchequer decided, that a right to use a natural stream for the purpose of washing ore, and carrying away sand, stones, rubble and other stuff dislodged and severed from the soil in the working of a mine and winning the ore, and to cause the stream to overflow its banks, might be acquired by custom or prescription at the common law, or by user under Lord Tenterden's Act. In *Murgatroyd v. Robinson*, 7 El. & Bl. 391, it was argued that a right to use a natural stream for the purpose of washing away the ashes from a steam engine and other sweepings of a mill on the bank of the stream, could not be acquired under Lord Tenterden's Act, as being unreasonable and destructive of the property of the owners lower down the stream; the court pronounced no opinion upon the question, as the case went off on another point, but no valid distinction can be made between this and the case last cited. The owner lower down clearly might grant the right claimed in one case as

well as in the other, and if so, according to the judgment in *Carlyon v. Lovering*, the statute would apply. In *Carlyon v. Lovering*, the court held that the right being limited by reference to the necessary working of the mine, could not be considered unreasonable, and might be claimed by prescription or custom; although no doubt any objection, on the ground of the claim being unreasonable and destructive, would be equally applicable to it if set up by way of custom, under Lord Tenterden's Act, as if set up by custom at the common law, as the second section is confined to such claims as might lawfully have been made at the common law; see ante, p. 4, note (*h*), and p. 20, note (*s*). See also *Moore v. Webb*, 1 C. B., N. S. 673, where a claim of right to foul a stream by using it for the tanning business was set up under the act; and *Stockport Waterworks Company v. Potter*, 7 H. & N. 160.]

(*j*) Com. Dig. Action on the Case for a Nuisance, A.

charge the rain running from the roof of his house upon the adjoining land. Easements.

The existence of such a right, both as to the eaves and water droppings, is recognized by the Court of Exchequer in *Thomas v. Thomas* (*k*).

There are ancient decisions, recognizing the same easement, in the case of a discharge of water on the neighbouring land by means of a gutter or leaden pipe (*l*).

“If a man hath a sue, that is to say a spout, above his house, by which the water used to fall from his house, and another levies a house paramount the spout, so that the water cannot fall as it was wont, but falls upon the walls of the house, by which the timber of the house perishes, this is a nuisance” (*m*). [In the case of *Pyer v. Carter* (*n*), there was an easement of both kinds for the defendant to have the rain water flow from his eaves on to the plaintiff’s roof, and for the plaintiff to have such water, together with the water originally falling on his own roof, carried away together by a drain on the defendant’s land.]*

These two classes of easements are distinctly recognized by the Civil Law, under the head of Urban Servitudes, “that a man shall receive upon his house or land the flumen or stillicidium of his neighbour” (*o*).

(*k*) 2 Cr., M. & Ros. 34.

(*l*) *Lady Browne’s case*, cited in *Sury v. Pigott*, Palmer, 446; Comyn’s Dig. Action on the case for Nuisance, A.; *Baten’s case*, 9 Rep. 53 b, recognized in *Hay v. Prentice*, 1 C. B. 828.

(*m*) Rolle, Abridg. Nusans, G. 5,

citing 18 Edw. 3, 22 b; Vin. Abr. Nuisance, G. 5.

[(*n*) Cited ante, p. 101.]

(*o*) Ut stillicidium vel flumen recipiat quis in ædes suas, vel in aream, vel in cloacam.—I. L. 1, ff. de serv. præd.

* *Harrop v. Hirst*, L. R., 4 Exch. 43; *Watts v. Kelson*, L. R., 6 Chanc. 166.

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[177] “The difference,” says Vinnius in his Commentary on this passage, “between the *flumen* and the *stillicidium*, is this—the latter is the rain falling from the roof by drops (*guttatim et stillatim*); the *flumen*, is when it is poured forth in a continuous stream from the lower part of the building. The servitude of receiving the *stillicidium* exists when my neighbour is compelled to receive upon his house the rain water running from my roof; the servitude of receiving the *flumen*, when he is compelled to receive the same flowing in a channel or conduit, and falling with force on his house.”

The Civil, as well as the English law, prohibited a man from projecting the wall or roof* of his house over the boundary line of his neighbour's land, even though, by spouts, or other means, the fall of water therefrom might be prevented: but a right to do so might be acquired by user; and when such projection did not, in any manner, rest upon the neighbour's soil, it was called *jus projiciendi*; where the projection was merely intended to protect the wall, either by creating shade against the heat of the sun, or keeping off the rain, it was the *jus protegendi*. “There is this difference between the right of projecting over and that of placing upon the neighbour's property—that the projection is carried out (*provehetur*) in such a manner as not to rest anywhere (*nusquam requiesceret*), as a balcony or eaves; while the thing ‘placed upon’ is so put as to rest on something, ‘as a beam or rafter’” (*p*).

* See page 315, note.

(*p*) Inter projectum et immissum hoc interesse, ait Labeo: quod projectum esset id; quod ita proveheretur ut nusquam requiesceret, qualia mæniana, et suggrunda es-

sent; immissum autem, quod ita fieret, ut aliquo loco requiesceret, veluti tigua, trabes, quæ immitterantur.—L. 242, § 1, ff. de v. s.

By the term water-course is usually understood a stream of water flowing above ground; but questions of a similar nature arise with reference to the right to water flowing in a subterraneous channel. In the case of a well, it is known that the supply of water is in general furnished by percolation through the neighbouring soil, so that the digging of a deeper well therein will divert the water from its course, and thus dry up the former well. If the right to water thus percolating is identical with that to water flowing above ground, it is manifest that antient possession would be unnecessary to confer a title to water flowing to a well, in the course of nature, from a superior elevation.

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In the first edition of this work it was said that the antient flow of a stream without interruption by the occupant of land above, is evidence of his assent to the continuance of such flow (*q*); but that, with regard to underground filtrations, as their course—and even their very existence—may be unknown to him, no such presumption ought to be drawn; because, as has been already shown, such a presumption ought not to be furnished by

(*q*) Water, it was said in an old case, *naturâ suâ descendit*, and in some sense a water-course may be said to be a gift of nature; but the right seems to depend, as in other cases, on the express or presumed grant of the superior and servient owner. “The law of water-courses is the same whether natural or artificial.” *Per Cur. Magor v. Chadwick*, 11 A. & E. 585. In many cases, such as a river which has always flowed in the same course, it obviously must have been directed in it by nature alone; but inasmuch as the tenant

of the higher land might have modified that course, there seems no reason for not applying the usual principles of prescription to the case of a river, and looking at the long continued mode of enjoyment as the evidence of the amount of the right to the flow of water. [The cases cited in the former part of this chapter, however, show that this is not the true principle, and the dictum in *Magor v. Chadwick*, cited in the note, cannot now be considered as law; see also the judgment in *Wood v. Waud*, cited post.]

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any enjoyment which is had either “*vi—clam—or pre-
cario.*” Moreover, supposing such actual knowledge to
exist, it is difficult to see in what manner he could pre-
vent the right being acquired; he could clearly maintain
no action; and, in the majority of instances, he could
not indicate his dissent, by cutting off the veins supplying
the neighbouring well or fountain, without serious detri-
ment to his own property. A further objection* to an
easement of this kind arises from the indefinite nature
and great extent of the obligation which would be im-
posed by it; instances have occurred where excavations
have had the effect of draining land, although at the
distance of some miles.

* See page 294,
post, act.

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*Cooper v.
Barber.*

In *Cooper v. Barber* (r) the defendant had, for many
years past, penned back a stream for the purposes of
irrigation, the consequence of which was, that the water
percolated through the neighbouring soil; the court
appear to have been of opinion that no right to cause
such percolation was acquired by the user, and that the
adjoining owner, on receiving injury from it upon erect-
ing a house, might bring an action for it.

*Balston v.
Bensted.*

A more recent case (s) appears to be somewhat at
variance with this doctrine: it may however be observed,
that the correctness of the ruling of Lord *Ellenborough*,
at *Nisi Prius*, could not be questioned, as the cause
was compromised. “The plaintiff and defendant were
respectively owners of adjoining closes on the banks of
the river Medway. As far back as could be recollected,
there had been a gush of water from a hole in the plain-
tiff’s close, which used to run from thence, on the sur-
face of the ground, to the river. About twenty-seven

(r) 3 Taunt. 99.

(s) *Balston v. Bensted*, 1
Camp. 463.

years before the action was brought, a bath was erected by the then occupier of the close near where the spring issued forth, and the water was conducted into it by a pipe. From that time till the present cause of action arose, the bath was amply supplied with water, and a considerable profit was derived from letting out the use of it to the public. In 1805 (the action being brought in 1808), the plaintiff purchased this close, and erected a paper manufactory upon it, for which a copious supply of spring water is essentially requisite. About the same time the defendant, becoming owner of the adjoining close, opened a stone quarry in it. As the excavations proceeded, considerable quantities of water were found, which interrupted the workmen. A deep drain was afterwards made to carry it off into the river, and the quarry was left dry. But in the meantime, the water flowing into the plaintiff's bath had been gradually decreasing, and, subsequently to the making of the drain, did not amount to more than an eighth or tenth part of its former quantity." For this diversion the action was brought. "The defence intended to be set up was, that the plaintiff had no exclusive right to the supply of water he claimed, as the principle on which twenty years' enjoyment of running water confers a right to it, appeared from the cases to be, that, after an adverse possession for so long a time, a grant was to be presumed from the owners of the land further up the stream; and such a grant could not be presumed here, as, previously to the drain being made, probably no individual knew that the plaintiff's spring was fed by water percolating through the strata in the close now occupied by the defendant." But Lord *Ellenborough* ruled, "That the only question was, whether the diminution of the supply of water to

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the plaintiff's bath had been caused by the drain dug by the defendant; and that there could be no doubt but that twenty years' exclusive enjoyment of water in any particular manner affords a conclusive presumption of right in the party so enjoying it." It was afterwards agreed, on the recommendation of the court, that the water should be conveyed from the defendant's quarry to the plaintiff's bath in the manner to be directed by an arbitrator, and a juror was withdrawn.

The proposition laid down by Lord *Ellenborough* in the above case appears to include under the same general rule water-courses of all descriptions, whether the stream flows in the ordinary manner above ground, or only emerges after having made its way through the adjoining land below the surface of the earth.

*Acton v.
Blundell.*

Since the above observations were made, in the first edition of the work, the point in question, at least as to the extent of the identity, in point of legal incident, of open and underground streams, has received judicial determination by the Court of Exchequer Chamber. The case of *Acton v. Blundell* (t) decided that the owner of land through which water flows in a subterraneous course has no right or interest in it which will enable him to maintain an action against a landowner who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry. *Tindal*, C. J., delivered the judgment of the court as follows: "The plaintiff below, who is also the plaintiff in error, in his action on the case, declared in the first count for the disturbance of his right to the water of certain *underground springs, streams and watercourses*, which, as he

alleged, ought of right to run, flow and percolate into the closes of the plaintiff, for supplying certain mills with water; and in the second count for the draining off the water of a certain *spring or well of water* in a certain close of the plaintiff, by reason of the possession of which close, as he alleged, he ought of right to have the use, benefit and enjoyment of the water of the said *spring or well* for the convenient use of his close. The defendants by their pleas traversed the rights in the manner alleged in those counts respectively. At the trial the plaintiff proved, that, within twenty years before the commencement of the suit, viz. in the latter end of 1821, a former owner and occupier of certain land and a cotton-mill, now belonging to the plaintiff, had sunk and made in such land a well for raising water for the working of the mill; and that the defendants, in the year 1837, had sunk a coal-pit in the land of one of the defendants at about three-quarters of a mile from the plaintiff's well, and about three years after sunk a second at a somewhat less distance; the consequence of which sinkings was, that, by the first, the supply of water was considerably diminished, and by the second was rendered altogether insufficient for the purposes of the mill. The learned judge before whom the cause was tried directed the jury, that, if the defendants had proceeded and acted in the usual and proper manner on the land, for the purpose of working and winning a coal-mine therein, they might lawfully do so, and that the plaintiff's evidence was not sufficient to support the allegations in his declaration as traversed by the second and third pleas. Against this direction of the judge the counsel for the plaintiff tendered the bill of exceptions which has been argued before us. And after hearing such argument,

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and consideration of the case, we are of opinion that the direction of the learned judge was correct in point of law.

“The question argued before us has been in substance this: whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to, and regulates, a water-course flowing on the surface.

“The rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established; each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land to use the same as he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above or below; so that, neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the licence or the grant of the proprietor above. The law is laid down in those precise terms by the Court of King’s Bench in the case of *Mason v. Hill* (x), and substantially is declared by the Vice-Chancellor in the case of *Wright v. Howard* (y), and such we consider a correct exposition of the law. And if the right to the enjoyment of underground springs, or to a well supplied thereby, is to be governed by the same law, then undoubtedly the defendants could not justify the sinking of the coal-pits, and the direction given by the learned judge would be wrong.

“But we think, on considering the grounds and origin

(x) 5 B. & Ad. 1; 2 Nev. & M. 747.

(y) 1 S. & S. 190.

of the law which is held to govern running streams, the consequences which would result if the same law is made applicable to springs beneath the surface, and, lastly, the authorities to be found in the books, so far as any inference can be drawn from them bearing on the point now under discussion, that there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law.

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“The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious: that the enjoyment has been long continued—in ordinary cases, indeed, time out of mind—and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or perhaps it may be considered as a rule of positive law, (which would seem to be the opinion of Fleta and of Blackstone,) the origin of which is lost by the progress of time; or it may not be unfitly treated as laid down by Mr. Justice *Story*, in his judgment in the case of *Tyler v. Wilkinson*, in the courts of the United States (z), as ‘an incident to the land; and that whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law.’ But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of the

(z) 4 Mason's (American) Reports, 401.

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neighbouring proprietor, but through the hidden veins of the earth beneath its surface ; no man can tell what changes these underground sources have undergone in the progress of time ; it may well be, that it is only yesterday's date, that they first took the course and direction which enabled them to supply the well : again, no proprietor knows what portion of water is taken from beneath his own soil ; how much he gives originally, or how much he transmits only, or how much he receives : on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. In the case, therefore, of the well, there can be no ground for implying any mutual consent or agreement, for ages past, between the owners of the several lands beneath which the underground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built ; nor, for the same reason, can any trace of a positive law be inferred from long-continued acquiescence and submission, whilst the very existence of the underground springs or of the well may be unknown to the proprietors of the soil.

“ But the difference between the two cases with respect to the consequences, if the same law is to be applied to both, is still more apparent. In the case of the running stream, the owner of the soil merely transmits the water over its surface : he receives as much from his higher neighbour as he sends down to his neighbour below : he is neither better nor worse : the level of the water remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbour from making any

use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil ; and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbour, he may impose on such neighbour the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of mining, and discovers when too late, that the appropriation of the water has already been made. Further, the advantage on one side, and the detriment to the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking-place for cattle ; whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined ; in the present case the nearest coal-pit is at the distance of half a mile from the well, it is obvious the law must equally apply if there is an interval of many miles.

“ Considering, therefore, the state of circumstances upon which the law is grounded in the one case to be entirely dissimilar from those which exist in the other ; and that the application of the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust ; we feel ourselves warranted in holding, upon principle, that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith.

“ No case has been cited on either side bearing

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directly on the subject in dispute. The case of *Cooper v. Barber* (a), which approaches the nearest to it, seems to make against the proposition contended for by the plaintiff. In that case the defendant had for many years penned back a stream for the purpose of irrigation, in consequence of which the water had percolated through a porous and gravelly soil into the plaintiff's land; but as this percolation had been insensible, and unknown by the plaintiff until the land was applied for building purposes, the court held, that the defendant had gained no right thereby, so as to justify its continuance. The case of *Partridge v. Scott* (b) is an authority to show, that a man, by building a house on the extremity of his own land, does not thereby acquire any right of easement, for support or otherwise, over the adjoining land of his neighbour. It is said in that case, 'he has no right to load his own soil, so as to make it require the support of that of his neighbour, unless he has some grant to that effect.' It must follow, by parity of reason, that, if he digs a well in his own land so close to the soil of his neighbour, as to require the support of a rib of clay or of stone in his neighbour's land to retain the water in the well, no action would lie against the owner of the adjacent land for digging away such clay or stone, which is his own property, and thereby letting out the water; and it would seem to make no difference as to the legal rights of the parties, if the well stands some distance within the plaintiff's boundary, and the digging by the defendant, which occasions the water to flow from the well, is some distance within the defendant's boundary: which is, in substance, the very case before us.

(a) 5 Taunt. 99.

(b) 3 M. & W. 230.

“The Roman law forms no rule, binding in itself, upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law, of most of the countries in Europe.

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“The authority of one at least of the learned Roman lawyers appears decisive upon the point in favour of the defendants; of some others the opinion is expressed with more obscurity. In the Digest, lib. 39, tit. 3, *De aquâ et aquæ pluvie arcendæ*, s. 12, ‘Denique Marcellus scribit, Cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi, nec de dolo actionem: et sanè non debet habere; si non animo vicino nocendi, sed suum agrum meliorem faciendi, id fecit.’

“It is scarcely necessary to say, that we intimate no opinion whatever as to what might be the rule of law, if there had been an uninterrupted user of the right for more than the last twenty years; but, confining ourselves strictly to the facts stated in the bill of exceptions, we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath its surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he

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intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action.

Recognized in
Chasemore v.
Richards,
post, p. 287.

"We think, therefore, the direction given by the learned judge at the trial was correct, and that the judgment already given for the defendants in the court below must be affirmed. Judgment affirmed" (c).

Though the court studiously abstained from giving any opinion as to what their judgment would have been had the well been shown to be antient, the arguments the judges advance seem to show that the antiquity of the well would not have fortified the right; [the principle of the decision of the House of Lords in *Chasemore v. Richards*, post, has settled the point].

In *Dickinson v. Grand Junction Canal Company* (d), the Court of Exchequer laid down that an action would lie against a landowner for digging a well and so preventing subterraneous water from reaching a natural

[(c) The principle of *Acton v. Blundell* applies to the case of draining off the water already collected in a well, and not merely to that of intercepting the water which would otherwise have flowed into it. *New River Company*, app., v. *Johnson*, resp., 2 E. & E. 435. In *Ennor v. Barrrell*, 2 Giff. 410 (on appeal, 1 De G., F. & J. 529), according to the report, it might be supposed that the Vice-Chancellor was of opinion, that the question, whether the principles established by *Chasemore v. Richards* are applicable to a particular case, is affected by the dis-

taunce through which the water would have to percolate before reaching the plaintiff's land, but it is impossible to reconcile this view with the existing authorities; and probably it would be found that the opinion expressed by his honor on that part of the case amounted really to a finding of fact, that the interruption complained of was like that of the interruption of a natural stream at its very source (see ante, p. 269); but whether the facts would justify such a finding is a question which cannot be here discussed.]

(d) 7 Exch. 282.

surface stream, which it would otherwise have reached, and this whether the water was part of an underground water-course, or would have reached the stream by percolation through the intervening strata; but this opinion has been overruled by the decision of the House of Lords in *Chasemore v. Richards* (e), affirming the judgment of the Court of Exchequer Chamber (f). The facts of that case appear from the opinion of the Judges, which was acted on by the House of Lords. That opinion was as follows:—

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“It appears by the facts that are found in this case, that the plaintiff is the occupier of an ancient mill on the river Wandle, and that for more than sixty years before the present action he and all the preceding occupiers of the mill used and enjoyed, as of right, the flow of the river for the purpose of working their mill. It also appears that the river Wandle is, and always has been, supplied, above the plaintiff's mill, in part by the water produced by the rainfall on a district of many thousand acres in extent, comprising the town of Croydon and its vicinity. The water of the rainfall sinks into the ground to various depths, and then flows and percolates through the strata to the river Wandle, part rising to the surface, and part finding its way underground in courses which continually vary. The defendant represents the members of the Local Board of Health of Croydon, who, for the purpose of supplying the town of Croydon with water, and for other sanitary purposes, sank a well in their own land in the town of Croydon, and about a quarter of a mile from the river Wandle; and pumped up large quantities of water from their well for the supply of the town of Croydon; and by means of the

Opinion of the
judges in
Chasemore v.
Richards.

(e) 7 H. of L. 349.

(f) 2 H. & N. 168.

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well and the pumping, the local board of health did divert abstract and intercept underground water, but underground water only, that otherwise would have flowed and found its way into the river Wandle, and so to the plaintiff's mill; and the quantity so diverted abstracted and intercepted was sufficient to be of sensible value towards the working of the plaintiff's mill. The question is, whether the plaintiff can maintain an action against the defendant for this diversion abstraction and interception of the underground water.

“The law respecting the right to water flowing in definite, visible channels may be considered as pretty well settled by several modern decisions, and is very clearly enunciated in the judgment of the Court of Exchequer in the case of *Embrey v. Owen* (g). But the law, as laid down in those cases, is inapplicable to the case of subterranean water not flowing in any definite channel, nor indeed at all, in the ordinary sense, but percolating or oozing through the soil, more or less, according to the quantity of rain that may chance to fall. The inapplicability of the general law, respecting rights to water, to such a case, has been recognized and observed upon by many judges whose opinions are of the greatest weight and authority. In the case of *Rawstron v. Faylor* (h), Baron Parke, in the course of delivering judgment, says, ‘This is the case of common surface water flowing in no definite channel, though contributing to the supply of the plaintiff's mill. The water having no definite course, and the supply not being constant, the plaintiff is not entitled to it. The right to have a stream running in its natural direction does not depend upon a supposed grant, but is *jure naturæ*.’

(g) 6 Exch. Rep. 353.

(h) 11 Exch. Rep. 382.

“In delivering the judgment of the Court of Exchequer in the subsequent case of *Broadbent v. Ramsbotham* (i), Baron *Alderson* observes, that ‘all the water falling from heaven, and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which it falls from dealing with it as he may please, and appropriating it. He cannot do so if the water has arrived at and is flowing in some definite channel. There is here no watercourse at all.’

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“In the earlier case of *Acton v. Blundell* (k), the Court of Exchequer Chamber was of opinion that the owner of the surface might apply subterranean water as he pleased, and that any inconvenience to his neighbour from so doing was *damnum absque injuriâ*, and gave no ground of action.

“There is no case or authority of which I am aware that can be cited in support of the position contended for by the plaintiff, or in which the right to subterranean percolating water adverse to that of the owner of the soil came in question, except the *nisi prius* case of *Balston v. Bensted* (l), and *Dickinson v. The Grand Junction Canal Company* (m).

“In the first of these cases, Lord *Ellenborough* is reported to have expressed an opinion that twenty years’ enjoyment of the use of water in any manner afforded an exclusive presumption of right. This opinion amounted only to the dictum of an eminent judge; followed by no decision upon the point, for the case ended in the withdrawal of a juror, and is directly at variance with the

(i) 11 Exch. Rep. 602, 615.

(l) 1 Camp. 463.

(k) 11 Mec. & Wels. 324.

(m) 7 Exch. Rep. 282.

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judgment of the Court of Exchequer in the other case, upon which the plaintiff relies, of *Dickinson v. The Grand Junction Canal Company*, in which the Court declared (n) ‘that the right to have a stream running in its natural course is *not* by a presumed grant from long acquiescence on the part of the riparian proprietors above and below, but is *ex jure naturæ*, and an incident of property as much as the right to have the soil itself in its natural state, unaltered by the acts of a neighbouring proprietor, who cannot dig so as to deprive it of the support of his land.’

“In the case of *Dickinson v. The Grand Junction Canal Company*, the very question now before your Lordships’ house arose, and that case is relied upon by the plaintiff as a decisive authority in his favour. The Court of Exchequer was of opinion that the company, by digging a well and pumping out the water, and so intercepting and diverting underground and percolating water which would otherwise have gone into a stream which flowed to the plaintiff’s mill, and was applied to the working of it, had become liable to an action for the infringement of a right at common law. In the same judgment, however, the court refers (o) to the case of *Acton v. Blundell* apparently with approbation, and observes, ‘that the existence and state of underground water is generally unknown before a well is made; and after it is made there is a difficulty in knowing, certainly, how much, if any, of the water of the well, when the ground was in its natural state, belonged to the owner in right of his property in the soil, and how much belonged to his neighbour. These practical uncertainties make it very reasonable not to apply the rules which

(n) 7 Exch. Rep. 299.

(o) 7 Exch. Rep. 300.

regulate the enjoyment of streams and waters above ground to subterranean waters.' But the court, without at all adverting to this distinction which it had adopted, treated the case of underground percolating water as governed by the same rules as would obtain in the case of visible streams and watercourses above ground; and no remark or comment was made or reason assigned by the court for arriving at a conclusion which not only does not seem warranted by the premises previously adopted, but is in effect hardly consistent with them. The plaintiff in that case was held to have a cause of action, independently of any infringement of a right at common law, by reason of the breach of an agreement between the parties and of an act of parliament; and a decision upon the right at common law seems not to have been necessary for determining the suit between the parties. These considerations greatly weaken the effect of the case of *Dickinson v. The Grand Junction Canal Company*, as an authority against the defendant upon the point now in question, but it is an authority in his favour to show that a right to water is not by a presumed grant from long acquiescence, but, if it exists at all, is *jure nature*, and that the rules of law that regulate the rights of parties to the use of water are hardly, or rather not at all, applicable to the case of waters percolating underground.

"In such a case as the present, is any right derived from the use of the water of the river Wandle for upwards of twenty years for working the plaintiff's mill? Any such right against another, founded upon length of enjoyment, is supposed to have originated in some grant which is presumed from the owner of what is sometimes called the servient tenement. But what grant can be presumed in the case of percolating waters, depending

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“ The question then is, whether the plaintiff has such a right as he claims *jure naturæ* to prevent the defendant sinking a well in his own ground at a distance from the mill, and so absorbing the water percolating in and into his own ground beneath the surface, if such absorption has the effect of diminishing the quantity of water which would otherwise find its way into the river Wandle, and by such diminution affects the working of the plaintiff's mill. It is impossible to reconcile such a right with the natural and ordinary rights of landowners, or to fix any reasonable limits to the exercise of such a right. Such a right as that contended for by the plaintiff would interfere with, if not prevent, the draining of land by the owner. Suppose, as it was put at the bar in argument, a man sank a well upon his own land, and the amount

of percolating water which found a way into it had no sensible effect upon the quantity of water in the river which ran to the plaintiff's mill, no action would be maintainable; but if many landowners sank wells upon their own lands, and thereby absorbed so much of the percolating water, by the united effect of all the wells, as would sensibly and injuriously diminish the quantity of water in the river, though no one well alone would have that effect, could an action be maintained against any one of them, and, if any, which—for it is clear that no action could be maintained against them jointly?

“ In the course of the argument one of your lordships (Lord *Brougham*) adverted to the *French* Artesian well at the *Abattoir de Grenelle*, which was said to draw part of its supplies from a distance of forty miles, but underground, and, as far as is known, from percolating water. In the present case the water which finds its way into the defendant's well is drained from, and percolates through, an extensive district, but it is impossible to say how much from any part. If the rain which has fallen may not be intercepted whilst it is merely percolating through the soil, no man could safely collect the rain water as it fell into a pond; nor would he have a right to intercept its fall, before it reached the ground, by extensive roofing, from which it might be conveyed to tanks, to the sensible diminution of water which had, before the erection of such impediments, reached the ground and flowed to the plaintiff's mill. In the present case the defendant's well is only a quarter of a mile from the river *Wandle*; but the question would have been the same if the distance had been ten or twenty or more miles distant, provided the effect had been to prevent underground percolating water from finding its

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way into the river, and increasing its quantity, to the detriment of the plaintiff's mill. *Such a right as that claimed by the plaintiff is so indefinite and unlimited that, unsupported as it is by any weight of authority, we do not think that it can be well founded, or that the present action is maintainable; and we therefore answer your lordships' question in the negative.*"

The judgment of the House of Lords was in favour of the defendant, and affirms the principles laid down in the above opinion (*p*).

It follows from the series of authorities already referred to, that no action will lie against a man who, by digging wells or cutting drains in his own land, thereby drains his neighbour's land also by intercepting the flow of the water percolating through the pores of the soil, and which, but for such digging or draining, would have reached his neighbour's land, or by causing the water already collected in fact on his neighbour's soil to *percolate away from and out of it*. See the case of *New River Company, App. v. Johnson, Resp. (q)*, in which it was attempted without success to distinguish the two cases, and so to narrow the effect of the authorities already cited.] *

(*p*) The question sometimes arises, whether a man is liable, not for intercepting, but for *causing the flow of* subterranean water into his neighbour's land. As to this, see *Smith v. Kenrick*, 7 C. B. 515, discussed post, p. 264, old paging. [(*q*) 2 E. & E. 435.]

* *R. v. Metropolitan Board of Works* (3 B. & S. 710) was decided on the same principle. It was there held that the claimant was not entitled to compensation for the abstraction of water from underground springs, which rose in his land and fed his ponds, by a sewer made by the Metropolitan Commissioners of Sewers under their act of parliament in adjoining land. And this notwithstanding the act provided not

By the civil law every man had a right to dig in his own land for the purpose of improving it, although he

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only that compensation should be made to all persons sustaining damage by the works authorized, but also that compensation should be made if the commissioners interfered with or prejudicially affected any ancient mill or any right connected therewith, or other right to the use of water. *Cockburn, C. J.*, dissented from the judgment on the ground that this special provision showed the intention of the legislature to give compensation in all cases in which damage might arise to water rights, whether such damage, if occasioned by the works of an adjoining proprietor, would have been actionable or not. (See also *Grand Junction Canal Company v. Shugar*, L. R., 6 Ch. 483.)

The same law applies where the surface and the mines beneath it belong to different owners, and where the surface has been granted and the mines retained. The owner of the mine is not responsible, if, in working the mines, he drains the water from the surface. "The grant of the surface cannot carry with it more than the absolute ownership of the entire soil would include. The absolute ownership is held not to include a right to be protected from loss of water by percolation with openings made in the soil of the neighbouring owner. How then can the grant of the surface only be held to include such a protection? To hold otherwise might not improbably result in rendering the reservation of mines and minerals wholly useless. Percolation of water into mines is an almost necessary incident of mining. And if the grant of the surface carries with it a right to be protected from any loss of surface water by percolation, the owner of the surface would hold the owner of the mines at his mercy, for he would be entitled by injunction to inhibit the working of mines at all. It is not at variance with this view that the case of *Whitehead v. Parks* (2 H. & N. 870) was decided, because in that case there was a lease and a distinct grant of the injured springs *eo nomine*." (*Ballacorkish, &c. Company v. Harrison*, L. R., 5 P. C. 49, 63.)

Where land was granted for building subject to a chief rent, and cottages were built upon it, and the owner afterwards granted the adjacent land to the builders of a church, whose excavations so far drained the land on which the cottages stood that the soil subsided and they became cracked and damaged, the church builders were held not responsible. The court said, "although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there is nothing at common law to prevent his draining that soil if for any reason it becomes necessary or convenient for him to do so. It may indeed be, that when one grants land to another for some special purpose,—for building purposes, for example,—then since, according to

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should thereby intercept the water, which supplied his neighbour's fountain (*r*).

Artificial
water-courses.

With regard to water-courses altogether artificial, there seems no reason to doubt that the long-continued submission of the servient owner to the discharge of water upon his tenement, or to the conducting of it through his land by the owner of the dominant tenement, will confer the right to continue the discharge of the water, or to continue to receive the supply of it, that

(*r*) Marcellus scribit, Cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi: nec de dolo actionem: et sanè non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi, id fecit.—L. 1, § 12, ff. de aq. et aq. pl. arc.

Si in meo aqua irrumpat, quæ ex tuo fundo venas habeat; si eas

venas incideris, et ob id desierit ad me aqua pervenire, tu non videris vi fecisse, si nulla servitus mihi eo nomine debita fuerit; nec interdicto 'Quod vi aut clam' teneris.—L. 21, ff. de aq. et aq. pl. arc.

Vide etiam L. 24, § 12, ff. de damno infecto.

the old maxim, a man cannot derogate from his own grant, the grantor cannot do anything whatever with his own land which might have the effect of rendering the land granted less fit for the special purpose in question than it otherwise might have been." They held that there was nothing in the grant to the plaintiff to warrant the inference of an implied condition to prevent the defendant from doing with the adjacent land what was incidental to its ordinary use, viz., draining it in order to render it more capable of being adapted to building purposes. (*Popplewell v. Hodgkinson*, L. R., 4 Exch. 248.)

But although a man is not bound to prevent the water percolating through his land from coming to his neighbour, or may drain the water from his neighbour's land, he cannot foul the water percolating from his land to his neighbour's injury. (*Womersley v. Church*, 17 L. T., N. S. 190.)

A grant of all streams of water that may be found in land, when at the time of the grant there is but one stream and several wells, includes the underground water in the land. The grantor cannot, nor can any one claiming under him, do anything the effect of which is to drain such underground water from the land. (*Whitehead v. Parks*, 2 H. & N. 870.)

is, to continue to receive the supply of it through the land of the servient owner (*s*). Subterraneous
channels.

A question of much greater difficulty arises in the case of a discharge of water, when the servient owner seeks to compel the dominant to continue it, and to prevent him from altering its course, and thus attempts to invert their relative positions, and himself to become dominant.

The chief objection to such a claim is, that there is no submission (*patientia*) by the dominant owner to the enjoyment of the water had by the servient—he discharges the water for his own convenience, and to what use the other may apply it when so discharged is immaterial to him—he has no means of preventing such an application but by discontinuing the discharge, and thus depriving himself of the benefit of his own easement. Right to re-
ceive water.
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It may be said that, according to this argument, the party discharging the water could acquire no right where the other party immediately on receiving it applied it to some useful purpose—as the latter had submitted to it only because it was advantageous to himself. The answer to this objection is, that there is a submission by the receiving party, which does not exist in the case of the discharging party. The active step, the immission of water, is the act of the latter. It is optional with the servient owner to submit to the immission or to oppose it. The motives which influence him to do one or the other are immaterial. The real inquiry in such cases must be by whose act the water was first caused to flow.

(*s*) Since the first edition of this book it has been so laid down in *Magor v. Chadwick*, 11 A. & E. 571; [this case has been observed upon as to other points in *Wood v. Waud*, post, p. 308; but the

author's proposition that a right may be acquired by a man to conduct water to his land across that of his neighbour, though from an artificial source, is untouched.]

Right to receive water.

Supposing it to be unknown by which party the flow of water was caused, and that the flow is beneficial to the owners of both tenements,—to the one by the discharge, to the other by the use to which he puts the water on receiving it,—it would probably be presumed that a reciprocal easement did exist.

Arkwright v. Gell.

The important case of *Arkwright v. Gell* (t) turned upon the right of the party receiving water drained from a mine, to compel the owners of the mine to continue such discharge. The court decided that no such right existed in that case.

- [183] “The plaintiffs in this case,” said Lord *Abinger*, on delivering the judgment of the Court of Exchequer, in the case of *Arkwright v. Gell*, “are the occupiers of certain cotton mills, at Cromford, in the county of Derby, and complain of an illegal diversion, by the defendants, of the water to which they were of right entitled for the supply of their mills. The defendants, by their pleas deny that right, and also insist that they have not been guilty of any illegal diversion. A special case was reserved on the trial, for the opinion of the court, stating a great number of documents and facts, upon which the court are not merely to give their judgment on matters of law, but to take the office of the jury, by determining whether any and what inferences of fact ought to be drawn from the facts stated. This course leads to one great inconvenience, as it tends to confound the rule of law with an inference of fact only, which inference might have been varied by a very slight circumstance.
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“From the facts and documents, however, the case appears to be this:—In the beginning of the last century,

(t) 5 M. & W. 203.

certain adventurers had in part constructed, and were proceeding to continue a sough, now called the Cromford Sough, for the purpose of draining a portion of the mineral field in the wapentake of Wirksworth. How they acquired the right to make that sough is not stated; it was, however, without doubt, either by virtue of the custom of mining there prevalent, or by the express license of the owner of the soil through which it was made. The adventurers received their remuneration in the shape of a certain portion of the ore raised from the mines within the level lying near and benefited by the sough (technically called, within the title of the sough,) in consequence of an agreement with the proprietors of the mines. The right to this easement, with its accompanying advantages, appears to have been the subject of sale and conveyance in that district; for in 1738 the proprietors leased it for 999 years for a pecuniary consideration, with a reservation by way of rent of a part of the profits. Mr. Arkwright, under whom the plaintiffs claim, and all whose rights they may be assumed to have had, by demise from him, when the cause of action accrued, became, in 1836, the purchaser of the reversion expectant on the determination of that lease, and he also acquired a portion of the interest of the lessees by a conveyance from some of them. It does not appear to us that this circumstance affects the question between the parties to this suit.

“ After the sough had been constructed, and a constant flow of water thereby conducted from the mines, the late Sir Richard Arkwright, the father of Mr. Arkwright, obtained, in the year 1771, a lease for eighty-four years, from the lord of the manor of Cromford, [185] (who, upon the special case, is alleged to have been the

*Arkwright v.
Gell.*

Arkwright v. Gill. owner of the land through which the Cromford Sough was made, and also the owner of a piece of land between the mouth of the sough and the brook into which the water was conveyed,) of that piece of land, the brook and the 'stream of water issuing and coming from Cromford Sough,' with the right of erecting mills on the piece of land. In 1772, Sir Richard Arkwright erected extensive cotton mills thereon, and in April, 1789, he purchased that land and the fee-simple in the mills and the manor of Cromford, including the lands through which the Cromford Sough was made.

"In the mean time, another company of adventurers had begun to construct another mining sough, called the Meerbrook Sough, on a much lower level in the adjoining township of Wirksworth. The defendants represent and have all the rights of that company of adventurers, and must, like the proprietors of the Cromford Sough, be assumed to have acted, either by virtue of a mining custom or by express license of the owner of the soil, confirmed by the Cromford Inclosure Act in 1802, and also to have had the authority, prior or subsequent, of the owners of the mines drained by that sough, and contributing a certain portion of the ore by way of recompense. These facts are not distinctly found, but we think we must infer that such was the case, and consequently that the defendants stand in the same relation to the plaintiffs as if the owners of those mines had themselves, with the consent of the owner of the soil, constructed the sough for the purpose of freeing their mines from water; for whether they made the sough themselves, or through the agency of the adventurers, is immaterial. In 1813 the defendants, being themselves

brook Sough, having made an agreement with the then proprietors of the Cromford Sough, and of other mines unwatered by it, and which appeared to have been then worked down to the level of that sough, for the purpose of regulating their respective rights, and the recompense to be paid by the latter to the former set of adventurers for the benefit to be derived by them by the extension of this sough, and the unwatering by means of it of a further portion of their mineral field below the level of the former sough.

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Gell.*

“The new sough was, therefore, constructed by the consent of some, if not all, of those mine owners who had formerly used the Cromford Sough, and in part for their benefit; and this circumstance places the defendants in the same position in respect to the diversion of the surplus water, as if they themselves had been owners of part of the mineral field formerly drained by the Cromford Sough, and were now proceeding to unwater a further portion of the same field by means of the new sough. When the Meerbrook Sough was thus extended, the water was found to flow into it, and flood-gates were constructed at the end, the closing of which prevented the water from finding its way in that direction, but which, when opened, let off the water which would otherwise have been discharged by the Cromford Sough, and thereby prevented it from flowing to the plaintiffs’ mill.

“In 1825 an arrangement was made for the mutual accommodation of Mr. Arkwright and the Meerbrook Sough proprietors, which was not to affect their rights, and which, having been determined in 1836, left them in the same situation as if it had never been made; and the gates being removed, in order to carry the sough further

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in that direction, and the water thereby diverted from the plaintiffs' mills, the defendants are in the same situation as if no flood-gates had been made, and as if in the construction of their sough for the purpose of draining another portion of the mineral field, they had broken the natural barrier which pent the water up and made it flow through the Cromford Sough, and so caused the water to pass out at a lower level through the Meerbrook Sough, and the question is—whether the defendants by so doing are rendered liable to an action at the suit of the plaintiffs. This question, which was most elaborately and ably argued during the last term, appears to us, strictly speaking, to be one as much of fact as of law; and, when the situation of both parties is fully understood, does not appear to us to be one of much doubt or difficulty.

“ The stream upon which the mills were constructed was not a natural water-course, to the advantage of which flowing in its natural course the possessor of the land adjoining would be entitled, according to the doctrine laid down in *Mason v. Hill* (*u*) and in other cases; this was an artificial water-course, and the sole object for which it was made was to get rid of a nuisance to the mines, and to enable their proprietors to get the ores which lay within the mineral field drained by it; and the flow of water through that channel was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine-owners required it, and in the ordinary course it would most probably cease when the mineral ore above its level should have been exhausted.

“ That Sir Richard Arkwright contemplated the dis-

(*u*) 5 B. & Adol. 1.

continuance of this water-course, (if the question of his knowledge in this state of things can be material,) there is evidence in the lease made in 1771, which contains a provision for a supply from the river, in the event of the stream being lessened or taken away by the construction of another sough: and also that such an event was not improbable, appears from the clause in the 2nd Cromford Canal Act, 30 Geo. 3, c. 56, s. 4. What, then, is the species of right or interest which the proprietor of the surface where the stream issued forth, or his grantees, would have in such a water-course at common law, and independently of the effect of user, under the recent statute 2 & 3 Will. 4, c. 71? He would only have a right to use it for any purpose to which it was applicable so long as it continued there. An user for twenty years, or a longer time, would afford no presumption of a grant of the right to the water in perpetuity, for such a grant would, in truth, be neither more nor less than an obligation on the mine-owner not to work his mines, by the ordinary mode of getting minerals, below the level drained by that sough, and to keep the mines flooded up to that level, in order to make the flow of water constant, for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine-owners could have meant to burthen themselves with such a servitude, so destructive to their interests; and what is there to raise an inference of such an intention? The mine-owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favour of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level,

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and thus taking away the water entirely—a course so expensive and inconvenient, that it would be very unreasonable, and a very improper extension of the principle applied to the case of lights—to infer from the abstinence from such an act an intention to grant the use of the water in perpetuity, as a matter of right.

“Several instances were put in the course of the argument of cases analogous to the present, in which it could not be contended, for a moment, that any right was acquired. A steam-engine is used by the owner of a mine to drain it, and the water pumped up flows in a channel to the estate of the adjoining land-owner, and is there used for agricultural purposes for twenty years. Is it possible from the fact of such an user to presume a grant by the owner of the steam-engine of the right to the water in perpetuity, so as to burthen himself and the assigns of his mine with the obligation to keep a steam-engine for ever, for the benefit of the landowner? Or if the water from the spout of the eaves of a row of houses was to flow into an adjoining yard, and be there used for twenty years by its occupiers for domestic purposes, could it be successfully contended, that the owners of the houses had contracted an obligation not to alter their construction so as to impair the flow of water? Clearly not: in all, the nature of the case distinctly shows that no right is acquired as against the owner of the property from which the course of water takes its origin; though, as between the first and any subsequent appropriator of the water-course itself, such a right may be acquired. And so, in the present case, Sir Richard Arkwright, by the grant from the owner of the surface for eighty-four years, acquired a right to use the stream as against him; and if there had been no

grant he would, by twenty years' user, have acquired the like right as against such owner; but the user even for a much longer period, whilst the flow of water was going on for the convenience of the mines, would afford no presumption of a grant at common law as against the owners of the mines.

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Gell.*

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“It remains to be considered whether the statute 2 & 3 Will. 4, c. 71, gives to Mr. Arkwright, and those who claim under him, any such right, and we are clearly of opinion that it does not. The whole purview of the act shows that it applies only to such rights as would before the act have been acquired by the presumption of a grant from long user. The act expressly requires enjoyment for different periods ‘*without interruption*,’ and therefore necessarily imports such an user as could be *interrupted* by some one ‘capable of resisting the claim;’ and it also requires it to be ‘of right.’ But the use of the water in this case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the Cromford Sough, and was incapable of interruption by them at any time during the whole period by any reasonable mode; and as against them it was not ‘of right;’ they had no interest to prevent it; and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water, so long as their mines were freed from it.

“We therefore think that the plaintiffs never acquired any right to have the stream of water continued in its former channel either by the presumption of a grant, or by the recent statute, as against the owners of the lower level of the mineral field, or the defendants acting by

their authority, and therefore our judgment must be for the defendants."

*Magor v.
Chadwick.*

[191] In *Magor v. Chadwick* (x) the plaintiffs complained of the pollution of a stream running to their brewery. The defendants traversed the plaintiffs' right to the stream. "It appeared that the stream or water-course claimed by the plaintiffs flowed from the mouth of an adit, or underground passage, in adjoining lands not belonging to the plaintiffs, and which had been originally made, upwards of fifty years ago, for the purpose of clearing the water from a certain mine, by the owner of the mine, but that the mine had not been worked for more than thirty years past; that, after the working was discontinued, the plaintiffs availed themselves of the water coming along this channel to brew beer, and, after clearing the adit themselves, had for more than twenty years obtained from it pure water for that purpose, and had erected a brewery there at a great expense. It was admitted that, at the time when the adit was originally made and the mine worked, the water must have been unfit for the uses to which the plaintiffs now applied it.

"The defendants were owners of other mines (copper mines), and had lately used the old adit for the purpose of draining them, by which the water had again been made foul and unfit for brewing. It was not shown that they were connected with, or claimed under, the owners of the adit or mine, or of the lands through which it flowed."

The learned judge also stated to the jury that, "in the absence of custom, artificial watercourses are not

(x) 11 A. & E. 571.

distinguished in law from such as are natural: that the same rules apply to them; and that twenty years' enjoyment might therefore warrant the jury in finding in favour of the right."

*Magor v.
Chadwick.*

The jury found a verdict for the plaintiffs. A rule nisi for a new trial was granted, and after argument the court of Queen's Bench took time to consider their judgment, which was delivered by Lord *Denman*. After some prefatory matter not material to this point, his lordship proceeded. "On the argument for a new trial, the defendants took other ground. They said that the artificial nature of the adit, and the known practice of all the mineral districts, were strong evidence, even in the absence of a custom, to show that the plaintiffs' enjoyment was not of right; because they must have known that the owner of the mine had made the watercourse for his own convenience, and had ceased to work it with the intention of resuming that work whenever it suited his interest, and with all the rights of throwing in dirt and rubbish which usually attend these operations. And great stress was laid on the recent decision in the Exchequer of *Arkwright v. Gell* (*y*), where the court, placed by consent in the situation of a jury, declined to draw the inference of an exercise by right, because they thought the circumstances would not have warranted the presumption of a grant. So, it was said, the universal mode of proceeding in the mining district would have been material to show that the plaintiffs used the water with no idea of having a right to it, but were merely taking advantage of the accidental non-user of the adit for such time as it happened to be useful to them.

"We are by no means prepared to say that the cir-

(*y*) 5 M. & W. 203.

*Magor v.
Chadwick.*

cumstances under which a water-course has been enjoyed may not prove it to have been without right; or that a universal practice in the neighbourhood might not lead to fix the party with knowledge that those who cleared a mine by an adit notoriously reserved to themselves the right of working the mine at any time. But this view was never pressed on the learned judge on the trial, the defendants relying on proof of their custom, and electing to stand or fall by the opinion which the jury might form upon it. The point was properly raised; and the complaint is not even that the verdict was wrong on the evidence put forward, but merely that the defendants themselves did not rest their case on such strong facts as they might.

“The imputed misdirection is, that the law of water-courses is the same, whether natural or artificial. We think this was no misdirection, but clearly right. The contrary proposition, that a water-course, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be so enjoyed as to confer a right to the use of the water, if proved to have been originally artificial, seems to us quite indefensible. And the late case in the Exchequer leads to no such conclusion.”

[The case of *Magor v. Chadwick* has, however, been commented upon and explained, in the case of *Wood v. Waud*. *Wood v. Waud* (z). In that case the waters from the workings of a colliery (partly pumped up and partly caused by the overflow of an old coal pit which had become filled with water) had for upwards of twenty years flowed through two artificial subterraneous channels; one of which, called the Bowling Sough, passed directly through the plaintiff's land; the other, called the Low Moor

Sough, passed into a natural stream called the Bowling Beck, which, so augmented, passed through the plaintiff's land. The defendant having works on the banks of each channel above the points where they respectively arrived at the plaintiff's land, and at the Bowling Sough, diverted the water of each of them. The channels were subterraneous, but the court determined the question as it would have stood if they had been surface streams. The judgment of the court contains a full exposition of the law affecting artificial water-courses, as will be seen from the following passage:—"This question is not with respect to the rights of the plaintiffs as against the owners of the collieries which the Soughs relieve from water, but as to the rights of the plaintiffs and defendants inter se; and it will be better to consider, in the first place, how they would stand if the streams were not underground. With respect to a claim of right as against the colliery owners, if it be true that a right was gained to these streams by the riparian proprietors as against them, in consequence of their acquiescence for twenty years by virtue of the presumption of a grant, or of Lord Tenterden's Act (2 & 3 Will. 4, c. 71), there would be no difficulty as to the right of the riparian proprietors against each other or against other persons. But Mr. Cowling admitted that a grant could not be presumed, and that he should have great difficulty in establishing the right under Lord Tenterden's Act. This court, as then constituted, much considered that subject in the case of *Arkwright v. Gell*. We have again considered it, and are satisfied that the principles laid down as governing that case are correct, and were properly acted upon in it, by deciding that no action lay for an injury by the diversion of an artificial water-course,

Wood v. Waud.

Wood v. Waud. where, from the nature of the case, it was obvious that the enjoyment of it depended upon temporary circumstances, and was not of a permanent character; and where the interruption was by the party who stood in the situation of the grantor. The Court of Queen's Bench, in a subsequent case, *Magor v. Chadwick*, supported a verdict for the plaintiff, for the disturbance of a right to the enjoyment of a stream under circumstances somewhat similar; but in that case the action was not brought against the party in whose land the artificial water-course commenced, nor any one claiming under him, and he had not put an end to it by altering the mode of working his mines; but, what is more important, the action was not brought for abstracting, but for fouling,—a species of injury which does not stand on the same footing; for, though the possessor of the mine might stop the stream, it does not follow that he, or any other, could pollute it whilst it continued to run; and besides, from the course which the cause took at nisi prius, the precise question which we have now to consider does not appear to have called for decision. The two cases are therefore distinguishable; and the expression used by the learned judges in that case, as to the similarity of natural and artificial streams, are to be understood as applicable to the particular case.

“We entirely concur with Lord *Denman*, C. J., that ‘the proposition that a water-course, of whatever antiquity and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible;’ but, on the other hand, the general proposition that, under all circumstances, the right to water-courses arising from enjoyment is the same

whether they be natural or artificial, cannot possibly be sustained. The right to artificial water-courses, as against the party creating them, surely must depend upon the character of the water-course, whether it be of a permanent or temporary nature, and upon the circumstances under which it was created, (a). The enjoyment for twenty years of a stream diverted or penned up by permanent embankments clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character and liable to variation. *Wood v. Wand.*

“The flow of water for twenty years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. The flow of water from a drain for the purposes of agricultural improvements for twenty years could not give a right to the neighbour so as to preclude the proprietor from altering the level of his drains for the greater improvement of the land (b). The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right. If, then, this had been a question between the plaintiffs and the colliery owners, it seems to us that the plaintiffs could not have maintained an action for omitting to pump water by machinery (and in this the Court of Queen's Bench and Exchequer entirely agreed in the case above cited).

[(a) See as to the case of a drowned mine, and the temporary support occasioned by the water, in *N. E. R. C. v. Elliott*, 29 L. J. 812; 1 J. & H. 145, S. C.]

[(b) See *Greatrex v. Hayward*, 8 Exch. 291, acc.]

Wood v. Wand. Nor, if the colliery proprietors had chosen to pump out the water from the pit, from whence the stream flowed continuously, and caused what is termed the natural flow to cease, could the plaintiffs, in our opinion, have sued them for so doing. But this case is different. The water has been permitted to flow in an artificial channel by the colliery owners, and for sixty years. And the question is one of more difficulty, whether the plaintiffs can sue another person, a proprietor and occupier of the land above and through which the sough passes, not claiming under or authorized by them, for diverting the water.

Right to natural stream includes right to all ordinary accessions.

“The case of the Bowling Sough differs from the Low Moor Sough in this, that the plaintiffs in 1838, used the water of the Bowling Sough where it passes through their land, by making a communication to their reservoir, for working the mill. Have the plaintiffs a right to the water of this sough? It appears to us to be clear, that, as they have a right to the Bowling Beck (the natural stream) as incident to their property on the banks and bed of it, they would have the right to all the water which actually formed part of that stream, as soon as it had become part, whether such water came by natural means, as from springs, or from the surface of the hills above, or from rains or melted snow, or was added by artificial means, as from the drainage of lands or of colliery works; and if the proprietors of the drained lands or of the colliery augmented the stream by pouring water into it, and so gave it to the stream, it would become part of the current; no distinction could then be made between the original natural stream and such accessions to it.

“ But the question arises with respect to an artificial Wood v. Waud. stream not yet united to the natural one.

“ The proprietor of the land through which the Bowling Sough flows has no right to insist on the colliery owners causing all the waters from their works to flow through their land. These owners merely get rid of a nuisance to their works by discharging the waters into the sough, and cannot be considered as giving it to one more than another of the proprietors of the land through which that sough is constructed; each may take and use what passes through his land, and the proprietor of land below has no right to any part of that water until it has reached his own land: he has no right to compel the owners above to permit the water to flow through their lands for his benefit; and, consequently, he has no right of action if they refuse to do so.

“ If they pollute the water, so as to be injurious to the tenant below, the case would be different.

“ We think, therefore, that the plaintiffs have no right of action for the diversion of that water. The question as to the Low Moor Sough is less favourable to the plaintiffs, for this sough does not pass through their land at all.

“ We are of opinion, that, if the plaintiffs would not be entitled to the water of the soughs if above ground, their being below ground in this case would probably make no difference. It does not certainly make a difference in favour of the plaintiffs.”

In accordance with the principles laid down in *Wood v. Waud*, it was held by the Court of Exchequer in *Greatrex v. Hayward* (c), that the flow of water, from a drain made for agricultural improvements, for twenty

years, does not give a right to the person through whose land it flowed to the continuance of the flow, so as to preclude the proprietor of the land drained from altering the level of his drains for the improvement of his land, and so cutting off the supply. *Martin, B.*, said, in *Rawstron v. Taylor* (*d*), that the motive was quite immaterial, and this, no doubt, would appear to be so, having regard to the principle laid down in *Wood v. Waud*, thus: "The right to artificial water-courses, as against the party creating them, depends upon the character of the water-course, whether it be of a permanent or a temporary character, and upon the circumstances under which it was created" (*e*). In *Beeston v. Weate* (*f*), it was unsuccessfully attempted to extend the application of those cases to one where the flow of the water of a natural stream was, for more than the statutory period, enjoyed by means of artificial works, executed from time to time for the purpose of diverting through the servient on to the dominant tenement; and Lord Campbell points out in his judgment in that case the distinction between the right to compel the continuance of a stream of artificial origin and the right to have the benefit of a natural stream by proof of a user to do so with the aid of artificial means (*g*).*

(*d*) 11 Exch. 384.

[*e*] Per *Parke, B.*, in *Broadbent v. Ramsbotham*, 11 Exch. 611.]

[*f*] 5 E. & B. 986.]

[*g*] It is laid down in the judg-

ment in *Wood v. Waud*, that, although a riparian owner may have no right to compel the continuance of a stream of artificial origin, yet he has a right of action for pollution of the water of the stream,

Sutcliffe v. Booth.

* *Sutcliffe v. Booth* (9 Jur., N. S. 1037). The plaintiff sued the defendant for fouling a water-course. *Wilde, B.*, directed the jury, that if it was an artificial drain made by the hand of man, the plaintiff had

except a right to pollute it has been acquired by user; in other words, that the right to send dirty water on to a man's land is not acquired unless the user has been to send dirty water; but a further question, upon which considerable diversity of opinion prevails, and it is equally applicable to natural and artificial watercourses, is as to the right of a person having a mere permission to use the water of a stream to maintain an action for an injury so caused to him in using it. In *Whaley v. Laing*, 2 H. & N. 476; 3 H. & N. 675, 901, the plaintiff, by permission of a canal company, made a communication from the canal to his own premises, by which water was brought on to them, with which water he fed his boilers, and the defendant fouled the water in the canal, whereby the water as it came into the plaintiff's premises was fouled, and by the use of it his boilers were injured. The defendant had no right or permission from the canal owners to do what he did.

The Court of Exchequer gave judgment for the plaintiff, reading an averment in the declaration that the water "ought to flow without being fouled in the canal," as an assertion, not that the plaintiff had

a right to the water there, but that the defendant had no right to foul it there; and holding that, as the defendant was the cause of dirty water flowing on to the plaintiff's premises without any right to do so, he was liable to an action. The court expressly abstained from giving any opinion upon the question, whether an action would have been maintainable against the defendant if the defendant had diverted the water, or if the plaintiff had been obliged to go to the canal and fetch the water instead of its flowing into his premises. In the Exchequer Chamber the judgment was reversed, but reversed upon grounds involving no dissent from the judgment below, viz.:—that a man has no right to cause dirty water to flow on to his neighbour's land without some special right to do so; but the judgments in the Exchequer Chamber show that it is very doubtful whether a person, having a mere permission from a riparian owner to take water out of a stream, can maintain an action against a wrong-doer for diverting or fouling the stream higher up. The preponderance of authority appears to be in favour of the negative.]

no right to it at all. The jury found that it was an artificial water-course, and returned a verdict for the defendant. The court held, that, although it was an artificial water-course, it might have been originally made under such circumstances and so used as to give the plaintiff all the rights that a riparian proprietor would have had, had it been a natural stream.

Gaved v. Martyn (19 C. B., N. S. 732). The plaintiff claimed a right to three artificial water-courses. One had been originally made by *Gaved v. Martyn*.

his predecessor in title, with the licence of the proprietor of the stream from which the water was derived, and he was held not entitled to it because the enjoyment was precarious. The second had been made adversely, for the enjoyment of his works, and used for twenty years. To this he was held entitled. The third was a drain made by miners, under whom the defendants claimed; and as they had never abandoned their control over it, the plaintiff was held not entitled to its continuance.

Irimy v. Stocker.

Irimy v. Stocker (L. R., 1 Ch. Ap. 396). An artificial water-course had existed from time immemorial, and been used during that time by tin bounders for working their mines. They were held to have acquired an easement in it by prescription. *Turner, L. J.*, "There is abundant authority to show that rights may well be acquired to the use of water in streams which may originally have been artificial, and the case of *Gaved v. Martyn* is plainly distinguishable from the present. The decision in that case, so far as it is in any way favourable to the defendant's case, seems to have proceeded upon the ground that there had been no permanent abandonment by the miners of their right of control over the stream; but in this case there can be no doubt at all that such right or control has long been abandoned."

Mason v. Shrewsbury and Hereford Railway Company.

Mason v. Shrewsbury and Hereford Railway Company (L. R., 6 Q. B. 578) was an artificial diversion of a natural water-course, and decided on the same principle. A natural water-course, called Ashton Brook, flowing through the plaintiff's land, had been diverted for upwards of forty years by a canal company under the powers of their act, and the bed had become silted up, and was no longer adequate to carry off the flood water in its natural state. The canal was discontinued and the waters restored to their former course, and the plaintiff's land was thereby flooded and damaged. The court held that he had no legal ground of complaint. *Blackburn, J.*, "He had the ordinary rights and liabilities of a riparian owner on the banks of a natural stream. He was entitled to have the water flow to him in its natural state so far as it was a benefit, and was bound to submit to receive it so far as it was a nuisance." He held that the enjoyment de facto of the relief from the water for more than forty years did not give a legal right to the continuance of that relief, because no obligation was imposed on the canal company to continue to take the water, and that his enjoyment was not of right, but only so long as the particular purpose for which it was taken was served. *Cockburn, C. J.*, gave judgment for the defendants, on the ground that the easement of the water-course existed for the benefit of the dominant tenement alone, and could not operate to make a new right for the benefit of the servient tenement. Like any other easement, it might be discontinued if it became onerous or ceased to be beneficial to the party entitled.

The easements acquired in and servitudes imposed by an artificial water-course depend on the purpose for which it has been made and used. If made as a drain and so used for the prescriptive period, it imposes a servitude to receive its waters on the lands over which it flows, but no easement for the beneficial use of its waters can be acquired in it by the occupier of those lands as against the dominant owner. If made to feed a manufactory and so used for the requisite period, or if made as a drain and used for a beneficial purpose for the prescriptive period, after the maker has ceased to exercise dominion over it, an easement so to use it is acquired.

In *Waller v. Mayor of Manchester* (6 H. & N. 667) provision had been made in a waterworks act for an artificial water-course, as compensation to the riparian proprietors for the diversion of the natural stream. The corporation of Manchester were empowered, subject to the provisions of the act, to construct a reservoir and intercept the waters of the river Ethrow. They were not to divert the water until the reservoir was completed and filled with water, and were to discharge out of the reservoir a specified quantity per day. It was held that there was no obligation to discharge the water until the reservoir was completed, although they had diverted the water for the purposes of their works, and that a proprietor could only sue them for diverting the natural stream.

*Waller v.
Mayor of Man-
chester.*

It is now decided that no one but a riparian proprietor has a right to the water of a stream as against other riparian proprietors. The Stockport Waterworks Company sued Potter for fouling the water of the river Mersey, coming to their works through a tunnel which they had made under a grant from a riparian proprietor. The Court of Exchequer held that they were not entitled to sue. The reason of the decision is given in the judgment of *Pollock*, C. B., and *Channell*, B. (in which *Wilde*, B., concurred). They say—"It is difficult to perceive any possible legal foundation for a right to have the river kept pure in a person situate as this company is. There seems to be no authority for contending that a riparian proprietor can keep the land abutting on the river, the possession of which gives him his water rights, and at the same time transfer those rights or any of them, and thus create a right in gross by assigning a portion of his rights appurtenant.

*Stockport
Waterworks
Company v.
Potter.*

"It seems to us clear that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water rights by virtue merely of his occupation. Can he have them by express grant? It seems to us that the true answer to this is, that he can have

them against the grantor, but not so as to sue other persons in his own name for the infringement of them. The case of *Hill v. Tupper* (2 H. & C. 121), recently decided in this court, is an authority for the proposition that a person cannot create by grant new rights of property, so as to give the grantee a right of suing in his own name for an interruption of the right by a third party." (*Stockport Waterworks Company v. Potter*, 3 H. & C. 300. See also *Crossley v. Lightowler*, L. R., 2 Ch. Ap. 478; *Wilts and Berks Navigation Company v. Swindon Waterworks Company*, L. R., 9 Ch. 451.)

*Nuttall v.
Bracemell.*

This decision does not apply to water flowing through a cut made through the land of a riparian proprietor with his licence, and continued to lower riparian land for working a mill on such land, and then returning to the stream. *Martin, B.*, held this to be a reasonable use of the stream, within the ruling of Lord *Kingsdown* in *Miner v. Gilmour* (12 Moo. P. C. 156, ante, 226). He said—"The right to a flow of water in a goit is a well-known easement and an incorporeal hereditament; and although it is not competent to an owner of land to render it subject to a new species of burthen at his fancy or caprice, the burthen of one man's land being subject to the right of another to have a flow of water running through it to work his mill is as old as the law itself, and is, in my opinion, the subject of property and of grant, not merely of licence." *Pollock, C. B.*, and *Channell, B.*, held the case distinguishable from *The Stockport Waterworks Company v. Potter*. "If the riparian proprietor grants to some one not such a proprietor, the grantee can sue only the grantor for any interference with him. If two adjoining riparian proprietors agree to divert the stream so that it shall run in two channels instead of one, the water passing again into the old stream below their land, and flowing down to the lower proprietors as before, the case is different. What is done is apparent to all, and any use that may be made of the new stream, as to turn a mill, is as apparent as if the mill were upon the old stream. What is done by the two proprietors may be supposed to be a more convenient way of making use of the flow of water, while it in no way diminishes or affects the rights of the other proprietors." (*Nuttall v. Bracemell*, L. R., 2 Ex. 1.)

*Holker v.
Poritt.*

Holker v. Poritt (L. R., 8 Exch. 107; 10 Exch. 59) is to the same effect. The owner of the land over which a stream flowed made an artificial continuation of it for the use of a mill. It was held that the owner of the mill had the rights of a riparian proprietor. The court said, the water which came down to him at the farm was his own to use, it as he pleased. There was no one entitled to share with him in its use, no one who could call him to account for any use which he chose to make of it there. In the case of *Stockport Waterworks v. Potter*, the water was taken directly from the stream, in the regular flow of which the proprietors below had an interest.

SECT. 2.—*Rights to Light and Air.*

The right to flowing water, in a natural stream, it has already been shown, is an ordinary right of property requiring no length of time to fortify it. The right to light and air seems to depend, however, upon very different grounds. The passage of light and air over lands unincumbered by buildings must necessarily have existed from time immemorial: but the use of the light and air so passing, by means of windows in a house or otherwise, confers no right unless it has been continued during twenty years. The natural rights of the owner of property in this respect seem to be defined by the legal maxim, "*Cujus est solum ejus est usque ad cælum et ad inferos*" (h);* and the passage of these elements over adjoining land affords *per se* no evidence of the enlargement of such right by an easement.

Mere appropriation not sufficient.

The right to the reception of light and air in a lateral direction [without obstruction] is an easement. The strict right of property entitles the owner to so much light and air only as fall perpendicularly on his land. He may build to the very extremity of his own land,

Lateral passage of light not of common right.

[(h) To place things projecting into the air over another's land is actionable. See *Pickering v. Rudd*, 4 Camp. 219; *Fay v. Prentice*, 1 C. B. 828. This is con-

tinually done at the present day in the case of buildings with cornices returned at the ends so as to project over the perpendicular boundary line of the next building.]

* See *Corbett v. Hill*, L. R., 9 Eq. 671. There No. 34, Eastcheap was conveyed to the defendant. On pulling it down it was found that part of the adjoining house projected into and was supported by his house. *James, V.-C.*, held that only such portion was carved out of the freehold of 34, Eastcheap as was included between the ceiling of the room at the top and the floor at the bottom, and the owner of No. 34, Eastcheap, being the owner of the solum, was owner of everything up to the sky and down to the centre of the earth, with that exception.

Lateral passage
of light not of
common right.

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and no action can be maintained against him for disturbing his neighbour's privacy, by opening windows which overlook the adjoining property (*i*); but it is competent to such neighbour to obstruct the windows so opened by building against them on his own land, at any time during twenty years after their construction, and thus prevent the acquisition of the easement (*k*); if, however, that period is once suffered to elapse, his long acquiescence becomes evidence, as in the case of other easements, of a title, by the assent of the party whose land is subject to it (*l*).

(*i*) *Chandler v. Thompson*, 3 Camp. 82.

(*k*) See per *Littledale, J.*, in *Moore v. Ramson*, 3 B. & C. 340. [Some expressions are to be found in the books implying doubts as to the appropriateness of the term easement in this case, and of the soundness of the theory that the origin of the right to light at the common law was either an implied covenant or grant. There appears to be no ground for such doubts. The implied grant is not of *the light*, but of the right to the negative servitude, binding the owner of the adjoining land not to build on it; or as was said by *Cresswell, J.*, 7 C. B. 566, "the land becomes subject to a right analogous to what, in the Roman law, was called a servitude," i. e. a servitude "*ne facias*;" and the easement so created affects the adjoining land by burthening it with a negative servitude "*ne facias*."

The supposed difficulties in the way of treating the right as an easement have no existence; and

a number of authorities, amongst others, Lord *Mansfield*, in *Darwin v. Upton*, 2 Wms. Saund. 175 c.; 2 Notes to Saund. 506; and *Littledale, J.*, in *Moore v. Rawson*, ubi sup., and *Parke, B.*, in *Harbidge v. Warwick*, sup. p. 173, appear to treat the right as originating in covenant or grant; but the point has become of little importance, as under the 2 & 3 Will. 4, c. 71, s. 3, twenty years' actual enjoyment of light without interruption confers an absolute right, except the enjoyment has been had under a written consent or agreement given for the purpose, p. 171, ante; and most cases fall within the statute.]

(*l*) As to right by implied grant see ante, p. 97; and as to a right under the stat. vide ante, p. 171. [In *Moore v. Rawson*, *Littledale, J.*, said that the right to light and air arose by virtue of an implied covenant not to obstruct by building on the adjoining tenement, distinguishing from the user of a right of way, when a *grant* may

In *Penwarden v. Ching* (m), to an action of trespass *Penwarden v. Ching.* for breaking and entering plaintiff's close, and breaking down boards, the defendant justified, because "the boards were obstructing an ancient window of the defendant, through which light and air at all times of right ought to pass, and that defendant entered and removed the same." The plaintiff replied, "that the light and air ought not to enter in manner and form," &c.

It appeared that the window was made in 1807, "under circumstances from which, connected with the subsequent use of it, the jury might presume a grant."

It was contended for the plaintiff, that the plea could not be sustained, as the window was shown not to be an ancient window.

Tindal, C. J., "The question is, not whether the window is what is strictly called ancient, but whether it is such as the law in indulgence to rights has in modern

be implied on the ground that as the right to the access of light and air is not exercised upon the adjoining tenement it cannot be the subject of grant.*

It may be observed that the learned judge did not advert to the distinction between positive and negative easements, and that the right of the access of light over land acquired, being in truth a right annexed to the house, whereby the owner of the adjoining land is prohibited from ob-

structing the flow of light to the windows of the house, falls strictly within the definition of a negative easement, "a privilege which the owner" of the house "has in respect of the adjoining land," by which the owner of the latter is obliged "not to do" something on his own land (*i. e.* not to build so as to obstruct the light) for the advantage of the dominant owner.]

(m) Moo. & Mal. 400, A.D. 1829.

* In *Harbidge v. Warrick* (3 Ex. 556), *Parke, B.*, said that a grant of an easement of light was in effect a covenant not to build on the grantor's soil to the injury of the light. This was adopted by *Watson, B.*, in *Rombotham v. Wilson* (8 E. & B. 143).

*Pemberton
v. Ching.*

times so called, and to which the defendant has a right, for this is the substance of the plea."

Nature of easement to light.

Some doubt appears to exist upon the authorities, whether the enjoyment of the passage of light through a window for twenty years confers a right upon the owner of the building to prevent his neighbour obstructing that particular window, or whether it imposes upon the neighbour's land the obligation of permitting the passage of a certain quantity of light, the amount of which is fixed by the original dimensions of such window, but the mode of enjoying which the owner of the house may vary at pleasure. This question becomes very material in considering the effect of any alteration in the mode of enjoying an easement (*n*).

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Easement of prospect not acquired by enjoyment.

By the laws of all countries, and by the English law at a very early period, it appears that an action would

(*n*) Vide post [Part III. Chap. II., Alteration by Encroachment. The judgment in *Renshaw v. Bean*, 18 Q. B. 129, implies, that if the house owner opens new windows, or varies the size or position of the old ones, the owner of the adjoining land is not bound to permit the passage of light sufficient for the old windows, and that he may lawfully obstruct the whole, if in order to obstruct the access of light to that which is new it is necessary also to obstruct the old. The right to obstruct a new window, where it cannot be done without also obstructing an old and unaltered one, appears to be questioned by some of the judges in Cam. Seacc. in *Hutchinson v. Copestake*, 9 C. B., N. S. 863, where the house owner had so

altered his ancient windows that none of them substantially corresponded with those in respect of which the right had been acquired, and the right to obstruct was held to exist. See the comments of *Kindersley, V.-C.*, upon *Renshaw v. Bean*, in the case of *Wilson v. Townend*, 30 L. J., Ch. 25. The last-mentioned judge held, in *Turner v. Spooner*, 30 L. J., Ch. 801, that alteration of the mode of framing and glazing the window is not such an alteration in the mode of enjoyment as to justify an obstruction. The question how far the original right is affected by alteration in the mode of enjoyment is discussed in the part of the work relating to extinguishment of easements, post, p. 363, old paging.]

lie for the obstructing of ancient lights (*o*). Although, however, by the civil law, a servitude of prospect could be acquired in the same manner as any other servitude, the law of England recognizes no such right (*p*),* except by express grant or covenant. Of the existence of the right when so created the squares in London afford well known instances. The validity of restrictions thus imposed is fully recognized by the Lord Chancellor in the recent case of *Squires v. Campbell* (*q*).

Easement of prospect not acquired by enjoyment.

In *The Attorney-General v. Doughty* (*r*), a motion was made for an injunction to restrain the defendant from proceeding with a certain building which would intercept the prospect from Gray's Inn Gardens; and the report states, "that the interposition of the court was desired, not on the foundation of a nuisance, but on a long enjoyment of right to this prospect by the Society, which right had been admitted formerly by parties concerned to dispute it, and by a court of equity; namely, in 1686, when several orders on petitions were made by Lord Jeffreys to restrain the building, so as (not) to intercept this prospect: and the manner of defence thereto shows this right of the Society was not disputed; it only going upon this, that the court was imposed on

Att.-Gen. v. Doughty.

(*o*) *Aldred's case*, 9 Rep. 58 b, 774, and the note (*k*), p. 88, ante, and cases there cited. and *Piggott v. Stratton*, 1 Johns.

(*p*) *Aldred's case*, 9 Rep. 58 b. 341; *Western v. McDermott*, L.

(*q*) 1 Mylne & Craig, 459. R., 2 Ch. 72.]

[See *Tulk v. Moxhay*, 2 Phil. (*r*) 2 Ves. sen. 452.

* *Butt v. Imperial Gas Company*, L. R., 2 Ch. Ap. 158. In *Smith v. Owen* (14 W. R. 422; 1 W. Notes, 49; 35 L. J., Ch. 317), an injunction was refused for obstructing the view into a shop by passengers. A man has neither a right for himself to look out of, nor for others to look into, his window. See, too, *Duke of Buccleuch v. Metropolitan Board of Works*, L. R., 5 Ex. 237.

Easement of
prospect not
acquired by
enjoyment.

*Att.-Gen. v.
Doughty.*

by the plans shown. That rights of this kind have been taken notice of appeared from the act of parliament made for adorning Lincoln's Inn, where the parties acquiesced under such a right." Lord *Hardwicke*, however, refused to grant an injunction before answer, saying, "I know no general rule of common law which says that building so as to stop another's prospect is a nuisance; was that the case, there could be no great towns, and I must grant injunctions to all the new buildings in this town. It depends on a particular right, and then the party must first have an opportunity to answer it. As to the orders made by Lord Jeffreys, who was too apt to do things in an extraordinary manner, *fortiter in modo* as well as *in re*, they were made on petition, without a bill filed, and those I lay out of the case. There may be such a right as this, as in the case of the act of parliament touching Lincoln's Inn: that was upon agreement of the parties, which if it was shown here it would be different."

Extent of
right acquired
by enjoyment.

The right to the use of light may be thus acquired, not only for the ordinary purposes of domestic life, but for the convenience of trade or manufacture; the extent of the right acquired by the user will be proportioned to the actual amount of enjoyment had during the requisite period; which, if doubtful, is a question of fact to be determined by a jury.

*Martin v.
Goble.*

In *Martin v. Goble* (*s*), an action was brought for obstructing lights. It appeared that the building in question had stood between thirty and forty years, and had formerly been used as a malt-house; but, about seven years before the commencement of this suit it was converted into a parish workhouse; the evidence was

contradictory as to the amount of light obstructed by the wall built by the defendant. *McDonald*, C. B., said, "It was not enough that the windows were, to a certain degree, darkened by the wall which the defendant had erected on his own ground, the house was entitled to the degree of light necessary for a malt-house, not for a dwelling-house; the converting it from the one into the other could not affect the rights of the owners of the adjoining ground. No man could, by any act of his own, suddenly impose a new restriction on his neighbour. This house had for twenty years enjoyed light sufficient for a malt-house, and up to this extent, and no further, the plaintiffs could still require that light should be admitted to it; the question, therefore, was, whether if it still remained in the condition of a malt-house, a proper degree of light, for the purpose of making malt, was now prevented from entering it by reason of the wall which the defendant had erected." The report does not state whether any new windows had been made in the house upon the change in its destination, or whether any alteration had been made in the form or size of the ancient windows, or other apertures, for admitting light.

Extent of right
acquired by
enjoyment.

*Martin v.
Goble.*

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In *Roberts v. Macord* (t) the defendant, in justification of a trespass for breaking down a wall, pleaded that the wall obstructed the passage of light and air to his timber-yard and sawpit, to which he was lawfully entitled for drying the timber, and the more convenient use and occupation of the timber-yard and sawpit. *Patteson*, J., said, "The plea was a very novel one, and one which, in his opinion, could not be supported in point of law. If such a plea could be sustained, it

*Roberts v.
Macord.*

(t) 1 Moo. & Rob. 230.

Extent of right
acquired by
enjoyment.

Roberts v.
Marford.

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would follow that a man might acquire an exclusive right to the light and air, not only as heretofore, by having been suffered to build on the edge of his property, and suffered for a certain space of time to enjoy that building without interruption, but merely by reason of having been in the habit of laying a few boards on his ground to dry; such a rule would be very inconvenient, and very unjust: still the question, in the present stage of the proceedings, was, was the plea proved in point of fact? Upon that point he did not think the mere circumstance of the defendant's having had a sawpit upon the premises, and laid his timber there during twenty years, would, in a case like this, be sufficient to raise the presumption of a grant. The jury must look to all the circumstances of the case, not forgetting the manner in which the defendant himself had occupied the premises. The questions for the jury were—whether the defendant had, in fact, used the sawpit and timber-yard for twenty years; and whether, during that time, the light and air had been really necessary for the purpose stated in the defendant's plea: if both these facts were made out to the satisfaction of the jury, they would find for the defendant; otherwise, for the plaintiff." The jury found for the plaintiff.

No attempt was made to impeach this ruling of the learned judge by any motion for a new trial; and, indeed, the questions left by him to the jury appear to be perfectly unobjectionable as far as the defendant was concerned; although, had the two questions been determined in favour of the defendant, it would appear that the plaintiff might have contended that a further point must have been found for the defendant; that his enjoyment

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was of such a nature as indicated to the plaintiff

that such an easement was claimed against him; or, in other words, that it was not vitiated by being *clam*.

Extent of right
acquired by
enjoyment.

*Roberts v.
Macord.*

The case, however, taken altogether, is no authority whatever for the general position deduced from it by the reporters in their marginal note, that "The use of an open space of ground, in a particular way, requiring light and air, for twenty years, does not give a right to preclude the adjoining owner from building on his land, so as to obstruct the light and air." Had the jury found the two questions left to them by the learned judge in favour of the defendant, and that he had, openly as well as in fact, used the timber yard for twenty years, and, notwithstanding such finding, the court above had decided that judgment must be entered for the plaintiff non obstante veredicto, the marginal note of the reporters would have been warranted by the case itself.*

* In *Potts v. Smith*, L. R., 6 Eq. 318, *Malins*, V.-C., said that the above marginal note correctly states the case. He there adopted it in a case where a le see complained of a person who claimed under his lessor building a wall to the obstruction of the air coming to his garden. He says—"In the present case, and in all others, it must be well understood, that, however agreeable and beautiful a garden may be, if another person has land immediately adjoining it, neither the pleasure derived from the scent or sight of the flowers will prevent the owner of the adjoining land from erecting whatever buildings on his land he thinks fit."

Potts v. Smith.

To found a claim to light there must be an aperture in a building placed there on purpose to admit light. (*Garrett v. Sharp*, 3 A. & E. 326.)

In *Lanfranchi v. Mackenzie* (L. R., 4 Eq. 421), the plaintiffs sued for an injunction to restrain the defendant from erecting a building so as to interfere with the access of light to an ancient window of a room, which, for the last fourteen years, they had used as a sample room for examining samples of raw silk, and for which they required an extraordinary quantity of light. *Malins*, V.-C., dismissed the suit on the ground that there was no material diminution of the quantity of light which hitherto flowed to the window, which would justify the court in interfering if the room had been used for the ordinary purposes of busi-

*Lanfranchi v.
Mackenzie.*

By the civil law, the servitude “ne luminibus officiatur” was one of the ordinary urban servitudes (*u*); a

(*u*) Cùm autem servitus imponitur—*ne luminibus officiatur*—*ædificare, atque ita minnere lumina nostrorum ædificiorum.*—*L. 4, ff. de serv. præd. urb.*
hoc maximè adepti videmur, ne jus sit vicino, invitis nobis altius

Lanfranchi v. Mackenzie. ness; and that the plaintiffs had no title to the extraordinary quantity of light they claimed, because they had not used the room as a sampling room for the period of twenty years. He says—“If there be a particular user, and the quantity of light claimed for that is such as would not belong to the ordinary occupations of life, a person who claims that extraordinary quantity of light cannot establish his right to it unless he can show that he has been in the enjoyment of it for twenty years. If he has been in the enjoyment of an extraordinary user for twenty years, that would establish the right against all persons who had reasonable knowledge of it. It has been argued that even after twenty years it would not do if the person had not knowledge of it. It is not necessary to say anything on that subject. I think there is great force in the argument. I am by no means stating that the plaintiffs would be entitled to succeed in that case unless they could show the defendants had knowledge of the use of their rooms for a particular purpose, because it would be the height of injustice for a man using a room for a particular purpose to say that his neighbours should be bound by a circumstance of which they had no knowledge, and of which the man claiming the right never gave them the opportunity of knowing.” He cited with approbation *Martin v. Goble*, and acted on the law there laid down, that the right to light, so far as respects quantity, depends on the use to which the building lighted by the window has been visibly applied. And with reference to the observation of Lord *Cranworth* in *Yates v. Jack* (L. R., 1 Ch. Ap. 298), “That the right conferred or recognized by 2 & 3 Will. 4, c. 71, is an absolute indefeasible right to the enjoyment of light without reference to the purpose for which it was used,” he said that Lord *Cranworth* was there directing his attention to a case where the plaintiffs were only claiming the ordinary degree of light, that is, such a light as a person is entitled to for ordinary purposes.

Wood, V.-C., in *Dent v. Auction Mart Company* (L. R., 2 Eq. 250), says, with reference to *Martin v. Goble* and *Yates v. Jack*, that the two decisions may be easily reconciled by saying that the Lord Chancellor’s observations may apply to the user of a house for any purpose for which it may be used in that condition, not to the user of a house where its whole character has been changed, and it has been rebuilt,

similar servitude also existed for the right of prospect(*x*), which appears to have been very extensive(*y*).

(*x*) Est et hæc servitus—ne prospectui officiat. —L. 3, ff. de serv. præd. urb.

Inter servitutes, ne luminibus officiat, et ne prospectui offendatur, aliud et aliud observatur; quod in prospectu plus quis habet ne quid ei officiat ad gratiorem prospectum et liberum: in luminibus autem (non officere) ne lumina cujusquam obscuriora

fiant; quodcumque igitur faciat ad luminis impedimentum, prohiberi potest, si servitus debeat. —L. 15, ibid.

[(*y*) The right to have lands kept free from obstructions for military purposes may be acquired under 23 & 24 Vict. c. 112; and see the old signal and Telegraph Act, 53 Geo. 3, c. 123.]

leaving the old windows untouched, as in the Malt House case. He held that if Messrs. Dent were minded to use their room as a sample room, they were entitled to sufficient light for that purpose, and it was immaterial whether they had been so using it for the last several years or not.

In *Truscott v. Merchant Taylors' Company* (11 Ex. 864), *Cresswell*, J., says—"The 3rd section of the Prescription Act does not say when the access and use of light shall have been enjoyed *as of right*, because every person has a right to so much light as can come in at his windows."

Truscott v. Merchant Taylors' Company.

In this he follows *Luttrell*, J., who, in *Moore v. Rawson* (3 B. & C. 340), says—"Every man on his own land has a right to *all* the light and air which will come to him, and he may erect, even on the extremity of his land, a building with as many windows as he pleases. If *the* light be suffered to pass without interruption for twenty years to the building so erected, the law implies, from the unobstruction of *the* light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building on his land shall continue to enjoy *the* light without obstruction so long as he shall continue the specific mode of enjoyment which he had been used to have during that period."

See also *Luttrell's case* (4 Rep. 87 a), which implies that a man who alters a hall into a parlour, retaining an ancient window, shall have the same quantity of light for his parlour as he had for his hall; and *Jackson v. Duke of Newcastle* (10 Jur., N. S. 688, 810; 33 L. J., Ch. 698), where Lord *Westbury* refused an injunction to restrain an obstruction to light, which might prejudice the future use of the house, on the ground that an injunction would not issue to prevent a mere speculative injury.

Luttrell's case.

Air.

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The right to the enjoyment of air is, generally speaking, at common law, governed by the same principles as those which regulate the passage of light.

Culcraft v. Thompson

In *Culcraft v. Thompson* (2 W. N. 8; 15 W. R. 387), Lord *Chelmsford*, C., said, that the right to light and air was not limited to the particular purpose for which the premises were used at the time when the obstruction was caused. If the owner had acquired a statutory right by enjoyment for twenty years, he had an indefeasible right to a free admission of light, whatever use he made of the building.

Courtauld v. Legh

Courtauld v. Legh (L. R., 4 Ex. 126), decides, that the actual use of light for any particular purpose is not essential to confer the right. It was there held, that the period of prescription was to be computed from the time when the structural portions of the house were completed fully, and before it was occupied, or in a condition to be occupied. *Kelly*, C. B., says—"I am of opinion that no occupation, in the sense of personal occupation, is necessary to constitute actual enjoyment within the meaning of the statute. It appears that the house was completed as to its external and internal walls, the roof and the flooring, and that windows had been put in capable of being opened and shut and admitting light. When a house is in that condition, it may properly be said, that the owner enjoys the use and access of light to it, and such enjoyment is sufficient to give a prescriptive title under the act.

Young v. Shaper

Young v. Shaper (7 W. N. 216; 21 W. R. 135), *Malins*, V.-C., "The allegation that much light is not required for the plaintiff's rooms, as they are now occupied, does not affect the case. If he thinks fit to use them as a store room, it is no reason why he should not hereafter employ them for other purposes requiring more light. He is entitled to the enjoyment of all the light and air to which he has been accustomed."

Aynsley v. Glover

In *Aynsley v. Glover* (L. R., 18 Eq. 548), *Jessel*, M. R., said, that the opinion of Lord *Westbury* in *Jackson v. Duke of Newcastle*, was not law, and that the decision of Lord *Cranworth* in *Vates v. Jack* was entirely in conflict with it.

On the other hand, the absolute right thus asserted must be understood with reasonable limitations, in accordance with *Ianfranchi v. Mackenzie*, as a right to use it for ordinary purposes, unless it has been used for special and extraordinary purposes with the knowledge of the servient occupier for the prescriptive period or has been granted for such purpose.

Adamson v. Gatty

Thus in *Adamson v. Gatty* (5 W. N. 184), *James*, V.-C., said, that he could not accede to the theory that the plaintiffs had an absolute right to the same quantity of light that had hitherto come to their windows, and that the builder of the adjoining house had no more right to take a specific portion of their light than a specific portion of their

The old authorities, however, mention a singular case *Windmills* of an easement of this kind, which might have the

garden. There was no absolute right to so much light as had been hitherto enjoyed by them, but simply to that enjoyment of light which they required. The question always was, whether there had been a substantial diminution of light so as substantially to interfere with the enjoyment or convenient occupation of the premises.

Again, in *Dickinson v. Harbottle* (8 W. N. 60; 28 L. T., N. S. 186), *Dickinson v. Harbottle*, *Malins, V.-C.*, adhered to his decision in *Lanfranchi v. Mackenzie*, and held, that the plaintiffs not having used the rooms for the special purpose of drying tobacco for twenty years, could not claim any special right on that account.

In this respect it would seem that the right to light is analogous to the right to pure air, and must be looked at from a reasonable point of view. (See *Tipping v. St. Helen's Smelting Company*, 4 B. & S. 608).

It is no answer to a suit for obstruction of light that the plaintiff has obtained as much additional light in another direction as the defendant is about to obstruct. "The right is a right between the owner of the dominant and the owner of the servient tenement. He has a right to as much light over his neighbour's land to and for the use of his house as he enjoyed twenty years ago, and the neighbour has no right to deprive him of such light, because the owner of the dominant tenement has either by purchase from, or by the free gift of any other person, or by the operation of an act of parliament, obtained other light in addition to that to which he had a prescriptive right." (*Dyers' Company v. King*, L. R., 9 Eq. 438).

In *Leech v. Schweder* (L. R., 9 Ch. 463), it was held, that a general grant of lights in a lease, coupled with a covenant for quiet enjoyment, conferred on the tenant only the ordinary right to light as it is known and limited by law and no greater right. *Leech v. Schweder*.

Where the plaintiff was described in the lease as a diamond merchant, a business that required an extraordinary quantity of light, *Stuart, V.-C.*, held, that the landlord was not at liberty to say you have only acquired the right to the ordinary light of a dwelling-house. He held it to be a case of express contract, and that the reversioners had lost their right to obscure the light in any degree. (*Hertz v. Union Bank of London*, 2 Giff. 686; 1 Jur., N. S. 127). *Hertz v. Union Bank*.

Although in this country, owing to the great value of land in cities and the small extent of properties, men are tenacious of every ray of light, and go through an immense amount of litigation to assert their right to it, in some of the United States of America (New York, Massachusetts, South Carolina, Maine, Maryland, Pennsylvania, Alabama and Connecticut) the doctrine of the English law does not prevail, and Law of America.

effect of imposing very extensive restrictions upon the owners of the neighbouring land.

Winch, J., said, "That where one erected a house so high that the wind was stopped from the windmills in Finsbury fields, it was adjudged that it should be broken down" (z).*

Easement of
air.

"In an assize of nuisance, brought because *levavit domum ad nocumentum* of his mill, by which the wind is stopped to come at his mill, so that he cannot grind, &c., and the jury find that the defendant has erected a house *de novo*, and that only two yards of the top of the house is to the nuisance, this is found for the plaintiff, for here the declaration is not falsified (falsifié)(a), but only abridged, and the judgment shall be, that the two yards

(z) Viner's Abridg. Nuisance, "satisfied" in Viner, Nuisance, G. pl. 19. N. 2, pl. 6.

(a) This is erroneously printed

a right to light cannot be acquired by prescription or implied grant; the courts there applying to the case of windows the reasoning in *Webb v. Bird*. In others (Illinois, New Jersey and Louisiana) the rule of the English law is adopted (Washburn on Easements, 583). A man may easily acquire a fringe of land surrounding his house to supply himself with light for his windows, and his neighbour may abstain from building on his land to the obstruction of his windows for a number of years for reasons other than because he is under an obligation not to build.

Windmill case
in *Winch*.

* Taken from *Winch's Reports*, 3, where, in what professes to be a report of the proceedings of the Court of Common Pleas in E. 19 James I, it is said—"Winch said that it was adjudged in this court, that where one erected a house so high in Finsbury Fields, by the windmills, that the wind was stopped from them, that it was adjudged in this case that the house shall be broken down." These Reports professing to be a translation of the judge's own notes, it seems strange that, instead of reporting a case, he should record an anecdote told by himself in court, and speak of himself in the third person. This is explained by the fact mentioned in the preface to Benloe and Dalison, that *Winch's Reports* are improperly ascribed to that learned judge.

be dejected." M. 11 Jas. 1, inter *Goodman and Gore and others*, adjudged (b).*

Easement of
air.

(b) 2 Rolle's Abr. 704, Triall, C. pl. 23. [The authorities in Viner and Rolle, above referred to, were cited in *Webb v. Bird*, 10 C. B., N. S. 268, where a claim to the free passage of air to a

windmill was set up under 2 & 3 Will. 4, c. 71, without success, the court holding that that statute only applies to affirmative easements, except in the case of light.]

* The case referred to by Rolle is reported in Godb. 221, as *Trahern's case* (C. P. 11 James), where, in an assize of nuisance, the plaintiff showed that he had a windmill, and that the defendant built a house so as it hindered his mill. The jury found that the defendant built the house, but that only two feet of it did hinder the plaintiff's mill, and was a nuisance. The Court (*Hobart*, C. J.) was of opinion that but part of the house should be abated, viz., that which was found to be a nuisance. In *Goodman and Gore's case* (C. P. 10 Jas., Godb. 189), Goodman brought an assize against Gore and others for erecting two houses to the west end of his windmill, per quod ventus impeditur, &c. It was given in evidence that the houses were about eighty feet from the mill in height, did extend above the top of the mill, and in length were twelve yards from the mill; and, notwithstanding, the court (*Coke*, C. J.) directed the jury to find for the defendant (see 10 C. B., N. S. 273, n.) On the cases in Rolle and Winch, *Willes*, J., observes, that there was a distinction between the ordinary mills and the prescriptive right which the lord of a manor had to compel all residents within the manor to grind their corn at his mill. Privileged mills of that description had peculiar rights. (10 C. B., N. S. 285.)

Trahern's case.

Goodman v. Gore.

These three windmill cases may perhaps be reduced to one, and that a case considered by the lawyers of the time as of no authority on the subject of easements. The first was tried before *Coke*, C. J., in 10 Jas. 1, reported by Godb. 189, as *Goodman v. Gore and others*. It will be seen by the report that Lord *Coke* displayed a disposition to trip the plaintiff up on a point of form, a circumstance consistent with the fact of the house being built contrary to a royal proclamation which he would not directly oppose, as he was then on his preferment, being then chief justice of the Common Pleas, and soon after appointed chief justice of the King's Bench. His opinion of these proclamations may be seen in 3 Inst. 201, "Of Buildings," where he says, "We have not read of any *act of parliament* now in force made against the excess of building, or touching the order or manner of building; but it is a wasting evil whereunto some wise men are subject."

Right to prevent access of impure air or water not an easement.

It may be observed here, that the right to a lateral passage of air, as well as to a flow of water superaddis

Also in 12 Rep. 74. The second case was tried the following year before *Hobart*, C. J., and brought to a more successful issue. It is cited by Rolle as *Goodman v. Gore*; the same name as that given to the first by Godbolt. Rolle does not refer to Godbolt, and probably took the case from his own notes before Godbolt was published. Godbolt was published in 1652, when Rolle was chief justice of the Upper Bench. Winch, eight years afterwards, says that such a case had been adjudged in the Common Pleas, and his description of the case fits the cases in Godbolt. There must have been something in the air if, at that particular time, three or even two men took it into their heads to build their houses close to windmills; an eccentricity which found no imitator until 1859, when Bird built his school-house close to Webb's mill. As to the authority of the windmill case, it is mentioned neither by Coke nor Hobart. Coke in his chapter on Buildings (3 Inst. 201), says, "Also the common law prohibits the building of any edifice to the common nuisance or to the nuisance of any man in his house, as the stopping up of *his light*, or to any other prejudice or annoyance of him." Rolle does not abridge it under the head of "*Nuisance*," where he abridges the judgment of *Wray*, C. J., in *Alldred's case*, as to the stoppage of air to windows, but under the head of "*Trial*," as an authority for the position that where a plaintiff declares that a whole building is a nuisance, and the jury find part only to be so, the action shall not entirely fail.

In old maps of London, a row of windmills appears on the heights to the north of London. Probably in the time of King James it was thought an alarming circumstance as affecting the supply of food to the city, that any one should build so near them as to take the wind from their sails. However, the houses have marched on and the windmills have vanished.

Webb v. Bird. In *Webb v. Bird* (10 C. B., N. S. 268; 13 C. B. N. S. 841), it appeared that the plaintiff's windmill was built in 1829. The defendant, in 1859 and 1860, built a school-house within twenty-five yards from the mill, which obstructed and diverted the currents of air that would otherwise have passed to the mill. The Court of Common Pleas held that as the plaintiff's mill was erected within time of legal memory, and there was no express grant, he could not prescribe under the Prescription Act, because the easements contemplated by the second section were only such as were capable of interruption. The Exchequer Chamber agreed with the Common Pleas that the right to the passage of air was not a right to an easement within the meaning of 2 & 3 Will. 4, c. 71, s. 2; and, further, that the claim could not be supported upon the presump-

a privilege to the ordinary rights of property, and is quite distinct from that right which every owner of a tenement, whether ancient or modern, possesses to prevent his neighbour transmitting to him air or water in impure condition; this latter right [which is hereafter treated of in the chapter on the legalization of nuisances] is one of the ordinary incidents of property, requiring no easement to support it, and can be countervailed only by the acquisition of an easement for that purpose by the party causing the nuisance.*

Easement of
air.

tion of a grant arising from the uninterrupted enjoyment as of right for a certain term of years, because they thought, in accordance with the judgment of the Court of Common Pleas in the case before them, and of the House of Lords in *Chesmore v. Richards* (7 H. Lds. Cas. 349), that the presumption of grant from long-continued enjoyment only arose where the person against whom the right was claimed might have interrupted or prevented the exercise of the subject of the supposed grant; and in the case of the windmill, it would be practically so difficult, if not absolutely impossible, to prevent the exercise of the right claimed, subject, as it must be, to so much variation and uncertainty that no presumption of a grant, or easement in the nature of a grant, could be raised from the non-interruption of the exercise of the alleged right by the person against whom it was claimed.

* In *Moseley v. Bland*, cited in *Aldred's case* (9 Rep. 58 b), Wray, C. J., said, that for stopping as well of the wholesome air as of light an action lies and damages shall be recovered for them, for both are necessary. And if the stopping of the wholesome air, &c., gives cause of action, à fortiori an action lies in the case at bar for infecting and corrupting the air. This judgment is thus abridged by Rolle (2 Rol. Abr. 141, Nussans, G., pl. 16). The stoppage of salubrious air is a nuisance as well as the stoppage of light. In *Webb v. Bird* (13 C. B., N. S. 844), *Blackburn, J.*, said that he wished to guard against its being supposed that anything in the judgment affected the common law right that might be acquired to the access of light and air through a window.

Air through
windows.
Moseley v.
Bland.

In *Gale v. Abbot* (8 Jur., N. S. 987), and *Dent v. Auction Mart Company* (L. R., 2 Eq. 238), injunctions were granted to remove and prevent impediments to ventilation. In the first case the defendant was ordered to remove a skylight which he had placed over his yard, and which materially impeded the passage of air to the window of the

Gale v.
Abbot.

Easement of
air.

By the custom of London, a man might rebuild his house, or other edifice, upon the ancient foundation to

Dent v. Auction Mart Company.

plaintiff's back kitchen. It was by that means alone that a thorough ventilation existed to the plaintiff's house, and the benefit therefore was not inappreciable. In the other case, *Wood, V.-C.*, asked "if there was any authority for interference in cases of obstruction of air as distinguished from light." To which the counsel answered probably not (L. R., 2 Eq. 242). In his judgment he says that the argument of the defendant's counsel as to the obstruction of air came to a *reductio ad absurdum*. Referring to the provision of the Metropolitan Building Act that every house shall have 100 square feet area for the purpose of ventilation, he says, "The plaintiffs, who had carried on business for a long time, were not to have their rights with respect to air measured by what may be supposed to be the minimum to be afforded to persons who inhabit the meanest houses for the purpose of comparison" (250, 251). Further on he says, "There is a staircase lighted in a certain manner by windows, which when open admit air. The defendants are about to shut up these windows, as in a box with the lid off, by a wall about eight or nine feet distant, and some forty-five feet high; and in that circumscribed space they purpose to put three water-closets. There are difficulties about the case of air as distinguished from that of light; but the court has interfered to prevent the obstruction of all circulation of air; and the introduction of three water-closets into a confined space of this description is, I think, an interference with air which this court will recognize on the ground of nuisance. This is, perhaps, the proper ground on which to place the interference of the court, although in decrees the words light and air are often inserted together, as if the two things went *pari passu*" (p. 252).

Johnson v. Wyatt.

In *Johnson v. Wyatt* (2 De G., J. & S. 18; 9 Jur., N. S. 1333), an injunction to restrain the obstruction of air was refused by the Lords Justices, on the ground that the obstruction would be casual and temporary only, depending on the direction of the wind.

Curriers' Company v. Corbett.

In the *Curriers' Company v. Corbett* (11 Jur., N. S. 719), it was argued, from air not being mentioned in sect. 3 of the Prescription Act, that the custom of London, as to building on an ancient foundation, was not affected by it so far as it related to the obstruction of air, and a formal objection was made to a decree of the Vice-Chancellor for an injunction on this ground. *Turner, L. J.*, said, that he should not be disposed to come to any decision upon it without some further evidence of the custom of the city extending to air, as well as light, of which there was no evidence. (See, too, *Dickinson v. Harbottle*, 8 W. N. 60; 28 L. T., N. S. 186).

what height he pleased, though thereby the ancient windows or lights of the adjoining house were stopped, if there were no agreement in writing to the contrary (*c*).

Easement of
air.
Custom of
London.
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In all cases *where the right is claimed under the statute*, a justification of a disturbance by force of this custom is taken away by the express enactment of the statute (s. 3), “any local custom or usage notwithstanding” (*d*).*

SECT. 3. — *Ways*.

Rights of way are at once the most familiar and important of the class of affirmative easements which impose upon the owner of the servient tenement the obligation to submit to something being done within the limits of his own property.

Rights of this nature are, in their exercise, intermittent; falling within the division of non-continuous easements already alluded to. These rights are in their extent susceptible of almost infinite variety: they may be limited both as to the intervals at which they may be

Ways non-
continuous
easements.

(*c*) Com. Dig. London, N. (5); of Exchequer Chamber, *Truscott v. Merchant Taylors' Company*, 11 Exch. 855; but see ante, p. 173, in note.]
(*d*) Since so decided in *Salters' Company v. Jay*, 3 Q. B. 109; 2 Gale & D. 414; [and by the Court

In *Baxter v. Bower* (10 W. N. 166), an injunction had been granted by *Bacon*, V.-C., against permitting so much of a shed to remain as would intercept the passage of light and air. The Lords Justices on appeal struck out of the order so much as related to air.

* *Cooper v. Hubbuck*, 12 C. B., N. S. 456; *Curriers' Company v. Corbett*, 11 Jnr., N. S. 719; *Fates v. Jack*, L. R., 1 Ch. Ap. 299; *Dent v. Auction Mart Company*, L. R., 2 Eq. 249.

Ways non-
continuous
easements.

used—as a way to church (e),* and the actual extent of user authorized—as a foot-way, horse-way, or carriage-

(e) Viner's Abr. Nuisance II., 15, citing 20 Ass. 18; 33 II. 6, 26.

Way to
church.

* The Year Books cited in Viner relate to a private way to a church appurtenant to the house of a parishioner, and to the same effect is Brooke's Abr. Chimyne, pl. 2, cited Com. Dig. Chimin, D. 2. But there may, it seems, be another description of way to a church for all the inhabitants of the parish by custom. To this description of way the following authorities refer :—F. N. B. 183, n. (427). A man shall not have a writ of assize of nuisance for a way to a church, because he has no freehold in the church. 4 Edw. 3 Nuisance, 8. *Hill v. Bedoe*, 16 James, 2 Rol. Rep. 41; 2 Rol. Abr. 287, Prohibition, F., pl. 48; Vin. Abr. Prohibition, F., pl. 48, between the churchwardens of Bithorne and Bowe. The churchwardens sued in the Spiritual Court for a way to the church, which they claimed to appertain to all the parishioners by prescription. The defendant denying the prescription, a prohibition was granted. *Smith v. Bennett*, 15 Car., March, 45, pl. 70; 2 Rol. Abr. 286, Prohibition, F. 47; Vin. Abr. Prohibition, F. 47. *Brackley and Coke* said, a libel may be in the ecclesiastical court for not repairing a way that leadeth to a church, but not for not repairing a highway. These cases are referred to by Ayliffe (Par. 438) and Gibson (Cod. 293) as authorities that the right to a church path, or the obligation to repair it, are within the jurisdiction of the ecclesiastical court (see also *Walter v. Montague*, 1 Curt. 261; 1 Burn, Ecc. Law, 395). In *Austin's case* (H. 23 & 24 Car. 2; 1 Vent. 189), Lord Hale says, "If a way lead only to a church, to a private house or to fields, 'tis a private way." In *Throner's case* (P. 24 Car. 2; 1 Vent. 208), the defendant was indicted for stopping a common footway to the church at Whirby. It was objected, that an indictment would not lie for a nuisance to a church path, but suit might be in the ecclesiastical court, and that the damage was private and concerned only the parishioners. Lord Hale says, if this were a common footway to the church for the parishioners, the indictment would not be good, for then the nuisance would extend no further than the parishioners, for which they have their particular suits (see also per *Dodderidge, J.*, *Shury v. Piggott*, 3 Bulst. 340; and per *Willes, C. J.*, *Drake v. Wighamsworth*, Willes, 658). Referring to these cases, it is said in Bac. Abr. (Highways, A.), that a way to a parish church, or to the common fields of a town or to a village which terminates there, may be called a private way, because it belongs not to all the king's subjects, but only to the particular inhabitants of such parish, house or village, each of whom, as it seems, may have an action for a nuisance therein. But in *Vincous v. Horenden* (Cro. El. 664), where a

way, [and the state of the tenement to which the way is claimed—as where a way is claimed to a tenement of a particular kind (*f*).]

Ways non-continuous easements.

Thus, a way may be granted for agricultural purposes

[(*f*) As to the effect of an alteration in the tenement, see *Allan v. Gomme*, 11 Ad. & Ell. 760, where it was held that a reservation of right of way to a shed, described as a space or opening under a loft, and then used as a woodhouse, did not give right of way to a cottage built in lieu of the open space under the loft. *Parke, B.*, said, in *Henning v. Burnet*, 8 Exch. 194, that he did

not concur to the full extent of the doctrine laid down in *Allan v. Gomme*, and that a right of way to a piece of land would mean a right of way for whatever purpose the land was used, unless limited by the context; see the cases referred to, post, in the Chapters on Extent and Mode of Enjoyment, and Alteration by Encroachment, pp. 333 and 363, *old paging.*]

way was claimed for all the inhabitants of the city of Canterbury, it was held, that without a special grievance shown by the plaintiff, an action lies not, and a case of *Westbury v. Powell* is there referred to of an action having succeeded by an inhabitant of Southwark for an obstruction of a watering-place common to the inhabitants of Southwark.

On the authority of this case of *Westbury v. Powell*, it was held in *Harrop v. Hurst* (L. R., 4 Ex. 43), that the plaintiffs, who, in common with other inhabitants of a district, enjoyed a customary right to have water from a spout for domestic purposes, was entitled to an action for diverting the water without proof of special damage.

A right of way cannot be claimed by parishioners by dedication within time of memory. In *Vestry of Bermondsey v. Brown* (L. R., 1 Eq. 204), *Romilly, M. R.*, says, “I do not doubt a parish might possess as private property a right of way as this ten-foot way in the same manner as they might possess a field, but it must be by grant from the owner of it; neither do I doubt that, if such a use was conferred on the parishioners, a dedication to the public would not be presumed without cogent evidence. A dedication to the parish by the owner of the soil cannot be presumed. A dedication from user can only be presumed in favour of the public generally, and not in favour of the inhabitants of a particular parish. This is laid down in *Poele v. Huskinson* (11 M. & W. 827), and is unquestionable law.” (Page 215). *Mounsey v. Ismay* (1 H. & C. 729) is an authority that such a way may be claimed by immemorial custom, but not by prescription under the Prescription Act. (3 H. & C. 486.)

Vestry of Bermondsey v. Brown.

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continuous
easements.

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Degrees of
ways.

only (*g*), or for the carriage of coals only (*h*), or for the carriage of all other articles except coals (*i*).

The civil law also recognized the validity of such modified rights (*k*).

Like other easements, rights of way may be acquired by user; but as such user is not continuous, and may vary at different times, great difficulties are presented both in law and in fact, in determining the amount of right conferred by it; though the maxim, "omne majus continet in se minus," seems equally applicable here as in other cases. The real difficulty is to ascertain what constitutes the relative majus and minus in rights of this nature. A man may allow the passage of foot passengers and carriages near his house, and yet refuse permission to drive cattle along the same road.

Iter.

Actus.

Lord Coke, citing the authority of Fleta and Bracton (*l*), says, "There are three kinds of ways: first, a foot-way, which is called *iter, quod est jus eundi vel ambulandi homini*; and this was the first way. The second is a foot-way and a horse-way, which is called *actus, ab agendo*; and this vulgarly is called pack and prime way, because it is both a foot-way, which was the

(*g*) *Reynolds v. Edwards*, Willes, 282.

(*h*) *Iveson v. Moore*, 1 Ld. Raym. 486; S. C., 1 Salk. 15.

(*i*) *Marquis of Stafford v. Coyney*, 7 B. & C. 257. See also *Jackson v. Stacey*, Holt, N. P. C. 455.

(*k*) Modum adjici servitutibus posse constat: veluti quo genere vehiculi agatur, (vel non agatur,) veluti ut equo duntaxat, vel ut certum pondus vehatur, vel grex

ille transducatur, aut carbo portetur.

Intervalla dierum et horarum non ad temporis causam sed ad modum pertinent jure constituta servitutis.—L. 4, §§ 1, 2, ff. de serv.

Usus servitutum temporibus scerni potest; fortè ut quis post horam tertiam usque in horam decimam eo jure utatur, vel ut alternis diebus utatur.—Ibid. L. 5, § 1.

(*l*) Co. Litt. 56 a.

first or prime way, and a pack or drift way also. The third is *via*, or *aditus*, which contains the other two, and also a cart-way, &c.; for this is *jus eundi, vehendi, et vehiculū et jumentum ducendi*" (m).

Degrees of
ways.
Via.
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The distinctions here taken by Lord Coke, which, in the terms used at all events, correspond with the definitions of the civil law, appear to be of no practical utility. If this division into three classes were rigorously observed, the second comprehending the rights peculiar to the first class, and the third those both of the second and first, it is obvious, that the establishment of a right to do any one of the things comprised in a superior class would at the same time establish a right to do, not only all the acts comprised in the inferior classes, but also all the other acts comprehended in that class of which it forms but a single instance. But such is clearly not the case by the law of England, in which it has been expressly decided that a right which, adopting Lord Coke's definition, is of the highest class, as, for instance, a right to drive carts, does not of necessity include the right to drive cattle, ranged by him in the subordinate class (n).

Extent of
right a ques-
tion for the
jury.

Although Lord Coke has made use of the same terms as the civil law, in distinguishing the several kinds of way, yet he appears by no means to have attached the same meaning to them. Thus, the *jus eundi* of the

(m) The text of the civil law is as follows:—*Iter* est *jus eundi ambulandi hominis, non etiam jumentum agendi (vel vehiculum). Actus* est *jus agendi vel jumentum vel vehiculum. Ita qui habet iter, actum non habet; qui actum habet, et iter habet, (coque uti potest,) etiam sine jumento.*

Via est *jus eundi et agendi et ambulandi; nam et iter et actum via in se continet.*—*l. ff. de serv. præd.*

(n) *Ballard v. Dyson*. 1 Taunt. 279; *Cowling v. Higginson*, 4 M. & W. 250; *Higham v. Rabbett*, C. P. 5 Bing. N. C. 622; S. C., 7 Scott, 827.

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the jury.

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civilians, comprised in the first class, included the right of riding on horseback as well as that of walking (*o*); the *actus* also appears to be more extensive, as comprising a right of passage for some species of carriage (*vehiculum ducere*), though in what precise manner this right was to be exercised appears to be doubtful (*p*); as, unless some restriction is put upon this right, great difficulty must exist in ascertaining the precise distinction between *actus* and *via*.

To remove this difficulty, one commentator (*q*) has suggested, that “the *actus* gave a right of passage only to a small cart or other vehicle drawn or pushed by the hand,” thus making the distinctions of the civil law more in accordance with those laid down by Lord Coke.

Lord Stair.

Lord Stair in his “Institutes,” after remarking, that by the civil law the greater right of way comprehends the lesser, says, “Our custom sticketh not to this distinction, but measureth the way according to the end for which it was constituted, and by the use for which it was introduced, as having only a foot road, or a road for a horse, to be led or ridden upon, or only a way for leading of loads upon horseback, or a way for leading of carts, or a way for driving of cattle, and is observed accordingly” (*r*).

Ballard v.
Dyson.

In *Ballard v. Dyson* (*s*), which was an action of replevin, the defendant avowed taking a heifer damage

(*o*) Iter est enim qua quis pedes vel eques commovere potest.—L. 12. De serv. præd. rust.

(*p*) Actus vero ubi et armenta trajicere et vehiculum ducere liceat.—Ibid.

(*q*) Bynkershoek.

(*r*) Book II. tit. 7, § 10 [see the judgment in *Dyce v. Lady James Hay*, 1 M.Q. Sc. Ap. 305, as to the accomodation of a prescriptive right to new inventions].

(*s*) 1 Taunt. 279.

feasant, and issue was joined upon a plea in bar of "a right of way to pass and repass with cattle from a public street, through and along a certain yard and way adjoining to the said place, in which, &c. towards and unto certain premises in the plaintiff's occupation as appurtenant thereon." On the trial it appeared, that the plaintiff's building had anciently been a barn, but had not been used as such for a great many years; that the folding-doors of it opened not to the plaintiff's yard, but to a highway; for many years it had been converted to the purposes of a stable; the last preceding occupier, who was a pork butcher, had used it as a slaughter-house for slaughtering his hogs; and the present occupier, who was a butcher, used it as a slaughter-house for slaughtering oxen. The yard in question, along which the right of way to these premises was claimed, was a narrow passage bounded by a row of houses on each side, the doors of which opened into it: when a cart and horse was driven through it, the foot passengers could not pass the carriage, but were compelled, on account of the narrowness, to retreat into the houses; and they would be exposed to considerable danger if they were to meet horned cattle driven through it. It was in evidence that the preceding occupier had been accustomed to drive fat hogs that way to his slaughter-house; and that the plaintiff had been accustomed to drive a cart, the only carriage which he possessed, usually drawn by a horse, but in one or two instances by an ox, along this passage to this barn, where he kept his cart; there was then no other way to it. He had lately begun to drive fat oxen that way to the premises for the purpose of killing them there; but there was no evidence of any other user than this of the way for cattle. No

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the jury.

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deed of grant was produced. The defendant produced no evidence that he had ever interrupted the occupiers of the plaintiff's premises in driving cattle there, nor that they had been usually possessed of horned cattle which had not been driven that way; he admitted that there was sufficient evidence of a right of way for *all manner of carriages*. It did not appear at what period the houses adjoining the way had been built.

For the plaintiff it was contended, that a right of way for all manner of carriages necessarily included a right of way for all manner of cattle; and therefore proved the prescription.

Mansfield, C. J., told the jury, that inasmuch as this was a private, and not a public way, they were not to conclude that a man might not grant a right of way to pass with horses and carts, and yet preclude the grantee from passing with all manner of cattle; and the degree of inconvenience which would attend the larger grant in this case, furnished an argument against the probability of it. He directed them, therefore, to say whether there was sufficient evidence of a right of way to drive cattle loose, or whether they would consider the grant or prescription as only co-extensive with the use that had been made of it. The jury found a verdict for the defendant.

A rule having been obtained and cause shown, the court, after taking time to consider, discharged the rule for a new trial. The judgments delivered by the Judges were as follows:—

Mansfield, C. J., having adverted to the facts of the case, observed, that “in general a public highway is open to cattle, though it may be so unfrequented that no one has seen an instance of their going there; but

the presumption would be for cattle as well as carriages, otherwise cattle could not be driven from one part of the kingdom to another. The authority cited from Hawkins only refers to Co. Litt., and the passage in Co. Litt. does not prove that Lord Coke was of opinion that in the case of a private way, which must originate in a grant, of which, the grant itself being lost, usage alone indicates the extent, evidence of a limited user could not be received to restrict the usual import of the grant. The general description given by Lord Coke does not seem to touch the question. He refers to Bracton (*t*), who only says 'there are *iter*, *actus*, and *via*;' but says not a word to explain the meaning of either, or the difference between them. Nor can I find in any of the books, nor even in any *nisi prius* case, any decision that throws light upon the subject. A parson has the *via* or *aditus* over a farm with carts to bring home his tithe, but he can use it for no other purpose. I have always considered it as a matter of evidence, and a proper question for a jury, to find whether a right of way for cattle is to be presumed from the usage proved of a cart-way. Consequently, although in certain cases a general way for carriages may be good evidence, from which a jury may infer a right of this kind, yet it is only evidence, and they are to compare the reasons which they have for forming an opinion on either side. As well at the trial, as since, I have thought that there might often be good reasons why a man should grant a right of carriage-way, and yet no way for cattle. That would be the case where a person who lived next to a mews in London should let a part of his own stable with a right of carriage-way to

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it, which could be used with very little, if any, inconvenience to himself; yet there it would be a monstrous inference to conclude that, if a butcher could establish a slaughter-house at the inner end of the news, without being indictable for a nuisance, he might, therefore, drive horned cattle to it, which would be an intolerable annoyance to the grantor. So cases may exist of a grant of land, where, from the nature of the premises, permission must be given to drive a cart to bring corn or the like, and that right might be exercised without any inconvenience to the grantor; but it does not follow that cattle may be driven there. The inconvenience in this case is a strong argument against the probability of a larger grant. The defendant was the proprietor of all these houses. My brother *Chambre* mentioned the case of a public way, restricted to carriages only, in which some public notice was affixed to caution the public that there was no drift-way, and thought that the absence of such notice in this case was an argument against the probability of the restricted grant. This notice might be requisite in a public way, but in a private way, out of which cattle were excepted, the grantor might reasonably think it unnecessary to give his grantee notice of that, of which he must already be conscious: he might justly suppose that the grantee, knowing the nature of his right, would not attempt to use the way otherwise than according to his grant. I can find no case in which it has been decided that a carriage-way necessarily implies a drift-way, though it appears sometimes to have been taken for granted. I speak with doubt, because my brother *Chambre* is of a different opinion; but I incline to hold that the verdict ought not to be disturbed."

Heath, J.—"This is a prescription for a way for cattle, and a carriage-way is proved. A carriage-way will comprehend a horse-way, but not a drift-way. All prescriptions are *stricti juris*. Some prescriptions are for a way to market, others for a way to church, and in the ancient entries, both in Rastal and Clift, the pleadings are very particular in stating their claims. In Rastal, tit. *Quod permittat*, the distinction is clearly seen. Sometimes there is a carriage-way qualified. One claim is remarkable, *fugare quadraginta averia*. The usage then in this case is evidence of a very different grant from that which is claimed, namely, to drive fat oxen, animals dangerous in their nature, and which there might be very good reason to except out of a grant of a way through a closely inhabited neighbourhood. The jury having heard the evidence, and formed their opinion upon it, I am not prepared to say that the verdict shall not stand."

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Lawrence, J.—"I should have been as well satisfied if the verdict had been the other way, but as the jury have decided upon the evidence, I am unwilling to disturb their verdict. This is the case of a prescriptive private way, which presumes a grant: the question then is, what was the grant in this case? That is to be collected from the use: for it is to be presumed that the use has been according to the grant. A grant of a carriage-way has not always been taken to include a drift-way. In the entries are cases of prescription, not for carriages only, but for cattle also. Co. Ent. 5, 6. *Quod permittat ad carriandum et recarriandum blada, focnum, et fimum, ac omnia alia necessaria sua, cum carris et carectis suis, et ad fugandum omnia et omnimoda averia sua*. The person who drew that entry certainly did not [208]

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conclude that a carriage-way included a drift-way for cattle. The use proved here is of a carriage-way: the grant is not shown, and the extent of it can only be known from the use. If the use had been confined to a carriage-way, I should have had no difficulty whatever in saying that it afforded no evidence of a way for horned cattle; for till they were driven there, no opposition could be made, nor the limitation of the right shown; but pigs have been driven that way, and stress is laid upon this circumstance. That then may be good proof of a right to drive pigs that way, but the user of the way for pigs is not proof of a right of way for oxen. The grantor might well consider what animals it was proper to admit, and what not. The place is very narrow, and full of inhabitants. There is no danger from pigs, and carriages have always some one to conduct them. Cattle may do harm, and passengers cannot always get out of their way: but if the cattle are driven forward serious injury may be done. The nature of the place, therefore, may probably have suggested a limitation of the grant."

Chambre, J.—"I think there ought to be a new trial; for all the evidence was on one side, and the verdict went against the evidence. I never thought that a carriage-way necessarily included a drift-way; but I think it is *primâ facie* evidence, and strong presumptive evidence, of the grant of a drift-way. Undoubtedly a person may restrict his grant as he pleases, and when he has so limited it, the pleadings must be adapted to the particular grant, which accounts for the variety in the entries. But it rests with the grantor to

[209] prove the restriction of the grant; otherwise it must be intended to be of the usual extent. This inconvenience

indeed may occur from such a determination, that, if the evidence be lost, the grantor may lose the benefit of his restriction, but he may and ought to preserve the evidence of the restriction; and the inconvenience would be of small extent; for I believe the cases are very few where a carriage-way has not been accompanied with this right. There seems to be almost a necessity for including it. The grantee may send back his horses without his carriage. He may draw his carriage with oxen, and the oxen, as well as the horses, must be driven back loose to pasture. There is strong presumptive evidence then of a drift-way. If the burthen of the proof lies on the tertenant, it certainly is possible that he may lose the right of restraining the way; but for one case where the evidence has been lost, and would be supplied by this decision, there will be a thousand cases where a restriction will be created that did not exist in the original grant. I fear these rights of way will be very much narrowed, if they are to be confined to such actual use of them as can be proved. The manner of using a way may vary from time to time. I think the proof of driving hogs is an important circumstance, and very strong evidence of a grant of way for cattle. According to the doctrine contended for, it would be necessary to drive every species of cattle in order to preserve the right of passing with that species. If a man had a little field where cows had not usually been pastured, it would be monstrous that he therefore should not drive his cow to it. Suppose any new species of cattle is introduced into the country, shall the grantees of private ways have no passage for them to their lands? Is it contended, for instance, that no ancient private way in the kingdom

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a question for
the jury.

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Dyson.*

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Dyson.*

can be used for Spanish sheep? Much of the argument has been built upon these being horned cattle. Many breeds of kine have no horns, may the grantee drive those? As to the argument that the inconvenience of such an use amounts to a nuisance, nothing of that sort appears. The grantee has constantly driven all the carriages and all the cattle that he had. This is a claim by prescription, which imports great antiquity, and it does not appear how wide the way was at the time of the original grant, and how much the houses have encroached on it long since, but those encroachments cannot deprive the grantee of his ancient right of way."*

One kind of
right of way
does not of
necessity in-
clude another
kind.

Assuming this case to have been properly decided, it would appear that, in the English law, a right of way of any one kind does not of necessity include any other kind. Supposing the question to arise upon the record, a plea of a right of way to drive carts or carriages would be no answer to an alleged trespass in riding on horseback across a man's land; or if pleas were framed strictly in accordance with the facts in *Ballard v. Dyson* a plea of a right of passage for carts would be no justification to a trespass committed by driving cattle.

Can proof of
one right be
evidence of
another?

Assuming this to be correct, a further question of considerable difficulty arises, "whether proof of the user of any one kind of way may be evidence of a right of any other kind;" or whether, to use the words of *Chambre, J.*, in *Ballard v. Dyson*, "it would be necessary to drive every species of cattle in order to preserve the right of passing with that species."

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On the authority of the case of *Ballard v. Dyson*, proof of one right cannot afford more than presumptive

evidence of another of equal or inferior degree, even if it go to that length, and evidence would be admissible of circumstances rebutting such presumption, such as in that case was given of facts showing the improbability of a grant for the passage of horned cattle along the road in question; and supposing that it does amount to this presumption, it must follow, that the onus probandi of showing the restriction will lie upon the party seeking to rebut the presumption, though in practice it is hardly to be expected that the question will ever be raised by the mere naked proof of a right of superior degree; as it is probable, that in proving the more extended right, the whole of the facts connected with the case would be given in evidence, some of which, as in *Ballard v. Dyson*, may afford grounds for a verdict of the jury finding the restricted right.

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Can proof of
one right be
evidence of
another?

Mr. Justice *Heath* and Mr. Justice *Lawrence* were, as has already been seen, of opinion, that proof of use of a cart may afford no evidence of a way for cattle. The former, indeed, lays it down, that "a carriage-way includes a horse-way, but not a drift-way;" while the latter seems to have proceeded on the general ground, that a grant not being shown, the extent of the right could only be shown from the use, from which he inferred, that proof of a use of a carriage-way and of a way for pigs afforded no evidence of a way for horned cattle.

Supposing such qualifying circumstances to appear in evidence on either side, it would be a question for the jury to say, whether the presumption of law, as to the superior including the equal and inferior class of easements, was rebutted by the evidence laid before them. With reference to this question, it might be

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a question for
the jury.**

important to show what had been the conduct of the parties in modern times: even modern user of the right claimed, if unobjected to, though not of itself sufficient to confer the right, would be obviously corroborative of the presumption of law.

Semble. Proof of higher right presumptive evidence of right of equal or inferior degree.

It has, however, been seen, that in the civil law the superior class of easements comprehended the inferior (*x*); and unless the authority of Lord Coke as to the classification above given is to be altogether repudiated, it seems impossible not to admit a similar rule into the English law, at least to the extent of raising a presumption that an easement of the superior class includes those of an equal or inferior degree, until the inference is rebutted by evidence: those of an equal degree, because the proof of one right is evidence of the whole class to which it belongs; those of an inferior, as naturally comprised in the more extensive right.

Upon the general principle, that every easement is a restriction of the rights of property of the party over whose lands it is exercised, the real question appears to be, under the peculiar facts of each case, whether proof of a right has been given co-extensive with that amount of inconvenience sought to be imposed by the right claimed. Upon this doctrine the classification of rights of way appears to depend, which assumes that the rights of each class impose an equal amount of inconvenience on the property subject to them. It is obvious, that, in some cases, a right to drive cattle might be productive of greater inconvenience than a right to drive carts, and

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(*x*) Ante, 341. Julianus refert cum qui actum stipulatus postea iter stipulatur, posteriore stipulatione nihil agere; sicuti qui de-

cem deinde quinque stipulatur. -- Vinnius, lib. 2, tit. 3, de serv. rust. 4.

vice versâ. It will, therefore, be for the jury to infer the extent of the supposed grant from the actual amount of injury proved under all circumstances attending it. If it appeared that the way had been used for all the purposes required by the claimant, there would be strong evidence of a general right; while, on the other hand, proof that the party having occasion for a particular way had not made use of the way in question would be almost conclusive evidence that he had not a right of way for that particular purpose.

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a question for
the jury.

This doctrine is supported by the recent case of *Cowling v. Higginson* (y), which was an action of trespass; which the defendant justified under a plea of right of way for horses, carts, waggons and carriages. It was held, that proof of user for farming purposes did not necessarily prove a right of way for the purpose of conveying coal, the produce of a mine lying under the defendant's land.

*Cowling v.
Higginson.*

In the course of the argument, Lord Abinger observed, "The extent of the right must depend upon the circumstances. If a road led through a park, the jury might naturally infer the right to be limited, but if it went over a common, they might infer a right for all purposes. Using a road as a footpath would not prove a general right, nor prove that a party had used a road to go to church only. Some analogy should be shown between farming and mining purposes." And *Parke, B.*, said, "If it had been shown, that from time immemorial it had been used as a way for all purposes that were required, would not that be evidence of a general

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(y) 4 M. & W. 245.

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*Cowling v.
Higginson.*

right of way? If they show that they have used it time out of mind for all the purposes that they wanted, it would seem to me to give them a general right. You must generalize to some extent. If your argument is to be taken strictly, it must be confined to the identical carriages that have previously been used upon the road, and would not warrant even the slightest alteration in the carriage or the loading, or the purpose for which it was used."

Parke, B., in his judgment, said, "To make out this plea, it is necessary to show an enjoyment of the way generally *as of right*, for the period during which the plea states it to have been used; he must have used it for all purposes *as of right*; and such user, for all purposes for which it was wanted, would be evidence to go to the jury of a general right. Under a plea of prescription of a way, it was necessary to show a user of it for all purposes time out of mind, according to the usual terms in which such a plea is pleaded. If it is shown that the defendant, and those under whom he claimed, had used the way whenever they had required it, it is strong evidence to show that they had a general right to use it for all purposes, and from which a jury might infer a general right. In this particular case, I think the user is evidence to go to the jury that the defendant had a right to a way for all purposes for twenty years. As to the *effect* of such evidence, it is unnecessary to offer any opinion. If the way is confined to a particular purpose, the jury ought not to extend it; but if it is proved to have been used for a variety of purposes, then they might be warranted in finding a way for all. You must generalize to some extent, and whether in the

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present case to the extent of establishing a right for agricultural purposes only, is a question for the jury" (z). Extent of right
a question for
the jury.

The correctness of this doctrine was also recognized in the case of *Higham v. Rabett* (a); in which it was held by the Court of Common Pleas, that a finding by the jury of a right of way for the purpose of carting timber, did not support a plea of a right of way for all carts, carriages, horses, and on foot, or even amount to a proof of any one of those rights taken separately, so as to admit of the verdict being entered distributively on the issue joined on the plea. *Higham v.
Rabett*

In *Brunton v. Hall* (b), it was held that a reservation in a lease of a right of way on foot, and for horses, oxen, cattle and sheep, did not give any right of way to lead manure (c). *Brunton
Hall.*

[(z) The same principle was acted upon in the case of *Dare v. Heathcote*, 25 L. J., N. S., Exch. 245; affirmed in error, 26 L. J., Ex. 164; and see *Hackins v. Carbines*, 27 L. J., Ex. 44.]

(a) 5 Bing. N. C. 622; S. C. 7 Scott, 827.

(b) 1 Q. B. 792; 1 Gale & Dav. 207. See also *Durham and Sunderland Railway Company v. Walker*, 2 Q. B. 963, as to the use of a railway for other purposes than those for which it was granted.

(c) It was contended also, on behalf of the plaintiff, that "to lead manure" might mean nothing more than to carry manure, and that if he had a right of way, he might, in the exercise of it, carry burdens. The authorities, however, seem to be much against the proposition, that a right of pas-

sage would in general give a right to transport burdens in the several modes in which the right of way might be exercised. See *Ballard v. Dyson*, 1 Taunt. 279; *Higham v. Rabett*, 7 Scott, 827; and particularly *Cowling v. Higginson*, 4 M. & W. 245; [and *Dare v. Heathcote*, ubi sup.] These cases seem distinctly to show that there is no positive division of rights of way into distinct classes. Where the extent of the right is to be inferred from user, it is for the jury to say, under all the circumstances attendant upon the user, *what is the right*, [subject to the distinction between cases of claims under the 2 & 3 Will. 4, c. 71, s. 2, and those at the common law, that in the latter the issue is as to the extent of the right, in the former as to the actual user; see ante, notes on

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the act]; and where the right is conferred by deed, the deed itself must be looked to for the same purpose. [See *Allan v. Gomme*, 11 A. & E. 760, and *Henning v. Burnet*, 3 Ex. 194.] Indeed, in the civil law, from which the earlier writers have adopted their technical terms, it would appear there was no rigorous classification of rights of way, unless the very terms "iter, actus or via," to which a particular meaning was attached, were adopted. The qualifications of ways seem to have been as numerous as in the English law, ex. gr. what kind of vehicle should be used or prohibited; that the way should only be used with a horse, or that a fixed weight or a particular commodity only should be conveyed, &c. So also it might be granted to be enjoyed only at certain days or hours. "Modum adjici servitutibus posse constat; veluti quo genere vehiculi agatur, vel non agatur, veluti ut equo duntaxat, vel ut certum pondus vehatur, vel grex ille transducatur, aut carbo portetur."—L. 4, § 1, De serv. "Usus servitutum temporibus scerni potest: forte, ut quis post horam tertiam usque in horam decimam eo jure utatur, vel, ut alternis diebus utatur."—L. 5, § 1.

As to the right of conveying burdens as attendant upon a right of way, it is true that, according to the civil law, a man having the right termed "iter," which was a right to pass on horseback as well as on foot, might be carried in a

litter, but he could not drive a beast of burden along it. So the right termed "actus," which was a right of passage for beasts of burden and carriages, gave no right to pass with waggons. "Qui sella aut lectica vehitur ire non agere dicitur. Jumentum vero ducere non potest, qui iter tantum habet. Qui actum habet, et plaustrum ducere, et jumenta agere potest. Sed trahendi lapidem aut tignum, neutri eorum jus est."—L. 7, ff. de serv. præd. rust. *Pothier*, in a note on the term "plaustrum," says, "Id est carrum; non verum plaustrum trahendis oneribus aptum."

It is obvious that to hold a right of way per se gave a right to carry burdens would impose a much more onerous obligation on the servient owner, for if he wished to build or plant trees on his tenement, he must leave a higher space than he would otherwise be obliged to do. For this reason it was, in the civil law, that the opinion was generally entertained that neither the *iter* nor *actus* gave the right to pass carrying a pole erect. "Quidam nec hastam rectam ei ferre licere; quia neque eundi, neque agendi gratia id faceret, et possunt fructus eo modo lædi."—L. 7, de serv. præd. rust. *Pothier's* note on this passage is as follows:—"Quidam jus rectæ hastæ ferendæ quod in servitute viæ contineri dicitur, in servitute actus non item, ita intelligunt; ut in servitute viæ non solum duntaxat ad certam latitudinem, sed etiam cælum serviat intra eam altitudi-

SECT. 4.—*Right to support from neighbouring Soil and Houses.*

The right to support from the adjoining soil may be claimed either in respect of the land in its natural state, or land subjected to an artificial pressure by means of buildings or otherwise.

A further right to support may, likewise, be claimed for one building from the adjoining buildings on either side.

In connexion with this subject, a question of considerable importance arises with regard to the degree of care which a party is bound to use in withdrawing support to which no right has been acquired by an easement.

nem quæ hastæ ferendæ par sit;	per quem via debetur, infra hanc
adeo ut is cui servitus debetur,	altitudinem quidquam habere;
possit planstrorum suorum onus	puta deambulationes arboribus
usque ad hanc altitudinem exa-	opacas, quæ servituti nocerent.
gerare; ille vero qui eam servi-	Ita Maranus ad h. tit."*
tutem debet, non possit in loco	

* In *Cousens v. Rose* (L. R., 12 Eq. 366), free liberty and right of way was granted to the lessee, his workmen and servants, and all other persons by his authority and permission. Lord Romilly held this to be a right of way on foot only.

A right of way is a right to go from one place to another and ought to be bounded and circumscribed to a place certain, and not in one place to-day and another to-morrow, but constant and perpetual in one place, and therefore the termini à quo and ad quem should appear. (*Albon v. Dremsall*, 1 Brownl. 216; Yelv. 164, nom. *Alban v. Brounsall*, Com. Dig. Chimin D. 2.) *Wilson, J.*, in *Rouse v. Nardin* (1 H. Bl. 355). In the case of private ways it is necessary to state the terminus à quo and the terminus ad quem, because private ways are given for particular purposes, and the justification must show that they are used for those purposes. A way cannot be claimed for purposes unconnected with the dominant tenement (*Ackroyd v. Smith*, 10 C. B. 164); but if a right of way to and from a particular piece of land is granted for all purposes, it will be understood as limited to purposes connected with the land to which it is appurtenant. (*Thorpe v. Brumfitt*, L. R., 8 Ch. 650.)

§ 1.—*Natural Support to Land.*

Natural sup-
port to soil.

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If every proprietor of land was at liberty to dig and mine *at pleasure on his own soil*, without considering what effect such excavations must produce upon the land of his neighbours, it is obvious that the withdrawal of the lateral support would, in many cases, cause the falling in of the land adjoining.

A right of
property not
an easement.

As far as the mere support to the soil is concerned, such support must have been afforded as long as the land itself has been in existence; and in all those cases at least in which the owner of land has not, by buildings or otherwise, increased the lateral pressure upon the adjoining soil, he has a right to the support of it, as an ordinary right of property, not as an easement, as being necessarily and naturally attached to the soil. The negation of this principle would be incompatible with the very security for property, as it is obvious, that if the neighbouring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone.

Wilde v.
Minsterley.

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Although there is no direct decision in support of this doctrine, yet the leaning of the courts appears to have been in its favour from a very early period: thus, in Rolle's Abridgement (*c*) it is laid down, "It seems that a man who has land closely adjoining my land, cannot dig his land so near mine that mine would fall into his pit; and an action brought for such an act would lie." "It may be true," said Lord *Tenterden*, in delivering the judgment of the Court of King's

(*c*) Vol. 2, 564, Trespass, Justification, I. pl. 1, *Wilde v. Minsterley*.

Bench in *Wyatt v. Harrison* (*f*), “that if my land adjoins that of another, and I have not, by building, increased the weight upon my soil, and my neighbour digs in his land, so as to occasion mine to fall in, he may be liable to an action.” *Wyatt v. Harrison.*

[This doctrine is treated, in the judgment of the Court of Queen’s Bench in *Humphries v. Brogden*, as one long settled by the law of England (*g*); and in the last-mentioned case it was decided that the like right of support exists in respect of the adjoining soil, subjacent as well as adjacent, so that if the surface and the subjacent soil be vested in different owners, the owner of the former has the like right as against the latter.

These rights of support are not rights to have the whole or any part of the adjacent or subjacent soil left in their natural state, but simply a right not to have the land injured by anything done, however carefully, in the adjoining soil subjacent or adjacent; and consequently until some actual damage is caused to the land by the withdrawal of the adjoining soil, no cause of action arises, and the Statute of Limitations does not begin to run (*h*).*

(*f*) 3 B. & Ad. 876.

(*g*) 12 Q. B. 739; see also the judgments of *Wood*, V. C., in *Hunt v. Peake*, 1 Johns. 705; 29 L. J., Ch. 787, and in *North Eastern Railway Company v. Elliot*, 2 De G., F. & J. 423; 10 H. Lds. 333; 1 J. & H. 145; *Harris v. Ryding*, 5 M. & W. 60; judgments in *Caledonian Railway Company v. Sprot*, 2

McQueen, Sc. Ap. 449; *Bonomi v. Backhouse*, E. B. & E. 655; 9 H. Lds. 503.]

[(*h*) See judgment in *Bonomi v. Backhouse*, E. B. & E. 655; 9 H. of L. 503, establishing the similarity, in this respect, of the acquired easement in respect of an ancient house to the natural right in respect of the soil unencumbered.]

* This does not apply when the minerals taken belong to the owner of the surface. Therefore, where mines had been worked under a lease

Even if the pressure upon the adjoining soil has been increased by buildings, however modern, on the surface, still an action will lie if the soil sinks not on account of this additional pressure, but on account of the operations in the adjoining soil, and would have sunk if there had been no buildings thereon (*i*).*

This natural right of support for the soil, unencumbered by buildings, is one which *primâ facie* exists in all cases as between the owner of the land and his neighbour, whether adjacent or subjacent; but that neighbour may, in some cases, enjoy the right to work in the adjacent or subjacent soil, so as to cause subsidence (*h*). Such a right is an easement (analogous to a right of way), and may be created either upon the

(*i*) *Stroyan v. Knowles*, and 705; 29 L. J., Ch. 785, *Wood*,
Hamer v. Knowles, 6 H. & N. V.-C.
 454; *Hunt v. Peake*, 1 Johns. (k) Judgment in *Rowbotham v.*
Wilson, 8 H. of L. 348.

from the vendor before the conveyance to the purchaser, and in consequence the land subsided after the conveyance, the Court of Exchequer held that there was no breach of the covenants either for title or quiet enjoyment, because the vendor purchased the land as it was at the time of the conveyance. *Kelly*, C. B., dissented, holding that the subsistence of the lease was a continuing breach of the covenant for title. (*Spoor v. Green*, L. R., 9 Ex. 99.)

* To sustain an action there must be appreciable damage. If the plaintiff's soil has fallen away in consequence of the defendant digging in his land, but there would have been no appreciable damage had it not been burdened with modern buildings, no action can be sustained. (*Smith v. Thackeray*, L. R., 1 C. P. 564.)

The right does not extend to have the support of any underground water which may be in the soil, so as to prevent the adjoining owner from draining his soil, if for any reason it becomes necessary or convenient for him to do so, the presence of the water in the soil being an accidental circumstance, the continuance of which the landowner has no right to count upon. (*Elliot v. North Eastern Railway Company*, 10 H. Lds. 359; *Pepplewell v. Hodgkinson*, L. R., 4 Ex. 248.)

original severance of the land between two owners (whether by an ordinary conveyance or by any statutory conveyance, as an inclosure award), or at any subsequent period, or may be acquired by user (*l*).*

[(*l*) According to the judgment in *Ronbotham v. Wilson*, *ubi sup.*, such a right may be conferred by grant, and it follows, that it may be acquired by user according to the principle enunciated in the judgment of the Court of Exche-

quer in *Curlyon v. Lovering*, 1 H. & N. 797, in like manner as a right to encumber the surface by spoil banks, &c. may be acquired. See *Rogers v. Taylor*, 1 H. & N. 706.]

* The right of the owner of the soil subjacent or adjacent to work it to the prejudice of the owner of the surface cannot be claimed by prescription or custom. In *Hilton v. Earl Granville* (5 Q. B. 701), the lord of a manor and owner of mines within it claimed first by prescription, and secondly by custom, a right to work the mines under any lands or messuages within the manor, without making compensation for any damage thereby done to the lands or messuages. The court held both the prescription and custom invalid, as oppressive and unreasonable, on the authority of *Broudbent v. Wilkes* (Willes, 360; 1 Wils. 63; 2 Str. 1224), where a similar custom was held bad because it could not be presumed that a tenant would originally have come into such an agreement, but was more likely to have originated in the arbitrary power of the lord. Lord Wensleydale, in the *Marquis of Salisbury v. Gladstone* (9 H. of Lds. 705), says, when there is no express grant, but one which is sought to be implied by usage, it is a condition required by law, that the custom should not be unreasonable, otherwise the prevalence of the usage is to be referred rather to the ignorance or carelessness of those whose property is affected by its exercise than to a grant. (S. C. 702, *per* Lord Cranworth; 709, *per* Lord Chelmsford; Bac. Abr. Customs, C.)

Custom to destroy surface.

Hilton v. Earl Granville.

And in *Blackett v. Bradley* (1 B. & S. 940), a custom for a lord of a manor to mine under the commons without leaving any support for the lands under which the mines were situate, and without making any compensation for damage done by such working, was held void on the authority of *Hilton v. Earl Granville*. It may be doubted whether there can be such a continual user as is necessary to support such a custom. The owner of the mines cannot be always letting down the same surface, and one part of the surface falling would not warrant the inference of a grant to let down another part; and in this respect the usage may want the certainty which is essential to custom and prescription.

Blackett v. Bradley.

There must be clear words indicating an intention to confer such a right, in derogation of the ordinary and

*Rombotham
v. Wilson.*

Rombotham v. Wilson (6 E. & B. 593; 8 E. & B. 123; 8 H. of Lds. 348) was an action for removing minerals without leaving sufficient support to the surface, whereby the plaintiff's houses, which were more than twenty years old, were injured. It appeared that ninety years before the action, by an award purporting to be made under an Inclosure Act, the surface on which the houses were afterwards built was allotted to one man and the mines under it to another. The award contained a covenant that the allottees of the mines should be at liberty to work them, and that the allottee of the surface should have no claim for any consequent sinking. The allottee of the surface executed the award as a deed, but the allottee of the mines did not. The Court of Queen's Bench held, that by the act of parliament and the award, and not by the covenant, which did not appear to them to operate as a covenant running with the land, the easement conferred on the owner of the surface for the support by the minerals, and the servitude imposed on the owner of the minerals, were of a qualified character, both being subject to the right of the owner of the minerals to work and get them in a careful manner, although the surface might be thereby injured; and that no right of support had been acquired for the houses, because there was no evidence from which a lost grant from the owner of the minerals could be presumed, and there was no evidence of enjoyment as of right from which an easement could be acquired under Lord *Tenterden's* Act.

The Exchequer Chamber held, that the right to subjacent support of the surface by the minerals was an ordinary right of property rather than an easement, but that it was capable of being relinquished, and that it was so by the covenant of the allottee of the surface, or by his accepting the surface on the terms of the award. The majority of the court held, that the award was not authorized by the Inclosure Act. *Cresswell, J.*, and *Watson, B.*, were for reversing the judgment of the Queen's Bench, on the ground that the covenant of the allottee of the surface was a mere covenant not to sue, and did not run with the land.

The judgment was affirmed in the Lords, on the ground that the covenant of the allottee of the surface operated as a grant to the allottee of the mines of the power to get the minerals and to disturb the surface of the land for that purpose; that it was a grant of a right to disturb the soil from below and to alter the position of the surface, and was analogous to a right to damage the surface by a way over it. They also held, that the award was valid under the Inclosure Act.

This case does not warrant the general proposition that such a right may be claimed by grant. The decision of the House of Lords may be

prima facie right to support, as against the adjacent owner (*m*).

(*m*) See *Smart v. Morton*, 5 E. & B. 30; *Roberts v. Haines*, 6 E. & B. 643; in Cam. Scacc. 7 E. & B. 625; *Dugdale v. Robert-*

son, 3 Kay & J. 695; *Proud v. Bates*, 11 Jur., N. S. 441; 34 L. J., Ch. 406.

accepted as a simple affirmance of the judgment of the Queen's Bench (see the statement of the case by *Willes, J.*, 19 C. B., N. S. 208), which proceeded on the ground that the award was warranted by the statute. If the execution of the award by the allottee of the surface was the effectual thing, the award, purporting to be made under the statute, was a public document, and the instrument by which the surface and the mines were separated of a nature to be known to everyone taking either the surface or the mines.

In *Richards v. Harper* (L. R., 1 Ex. 199), the owner of freehold and copyhold land sold the copyhold, and the purchaser covenanted and granted that the vendor might work mines in his freehold without making compensation for damage to buildings to be erected on the copyhold; the covenant was not entered on the court rolls. A subsequent purchaser, who had enfranchised the copyhold and had no notice of the covenant, was held not bound by it. The majority of the court, *Martin, Channell and Pigott, BB.*, *Pollock, C.B.*, dissenting, held that it would have made no difference if the land had been freehold.

Richards v. Harper.

In *Wakefield v. Duke of Buccleuch* (L. R., 4 Eq. 199) it was argued, that the decision in *Hilton v. Earl Granville* had been much shaken, and was "on its last legs;" but *Malins, V.-C.*, followed it in an elaborate judgment, in which he reviewed all the authorities, and held that although the dictum of the court in *Hilton v. Earl Granville*, that a grant reserving a right to destroy the surface would be void, had been overruled by the House of Lords in *Ronloatham v. Wilson*, the decision that a custom to that effect was void was in effect recognized by the House of Lords. He said, that there was a remarkable distinction between disturbing the surface by working quarries, which in that case was reserved to the lord of the manor by the Inclosure Act, and letting down the surface by mining operations. Mining operations might go under the whole land, whereas a quarry was usually of very limited area. And being satisfied that if the surface was once let down it was for ever destroyed, he granted a perpetual injunction against the defendant's working the mines in such a manner as to cause a subsidence of the surface.

Wakefield v. Duke of Buccleuch.

In the House of Lords, the Lord Chancellor (*Hatherley*) did not stop to inquire whether the authority of *Hilton v. Lord Granville* would now be fully recognized or not (L. R., 4 H. Lds. 399), and Lord *Chelmsford* thought it was open to question. (Page 410.)

The dicta reported in some cases, that upon a mere grant of the minerals with power to win them, the grantee would not be liable for subsidence caused by working the minerals, cannot be reconciled with the authorities. See *Harris v. Ryding* (*n*); the judgments of Lord *Wensleydale*, in *Rowbotham v. Wilson* (*o*), and Lord *Cranworth*, in *Caledonian Railway Company v. Sprot* (*p*). In fact, in all such cases the grant is taken to be subject to the right of support, unless an intention to the contrary appears either expressly or by necessary implication.

No distinction upon principle can be made between cases where the severance is by an ordinary conveyance, and where it takes place under the compulsory power of an act of parliament (*q*); but there are cases where the severance has been effected under the provisions of railway and canal acts, and when such acts have contained express provisions, which have been held to qualify the ordinary right of support (*r*).

The question, whether the right of support exists, appears not to depend upon whether the conveyance by which the severance of the lands is effected is purely voluntary or under the provisions of an act of parliament, but whether the provisions of the act in the particular case indicate an intention that the right *primâ facie* existing in every case, as between the owner of

(*n*) 5 M. & W. 60.

(*o*) 8 H. of L. 360.

(*p*) 2 M'Q. Sc. Ap. 451.

(*q*) *Wood, V.-C.*, in *North Eastern Railway Company v. Elliott*, 29 L. J., Ch. 787.

(*r*) *Dudley Canal Company v. Grazebrook*, 1 B. & Ad. 59;

Stourbridge Navigation Company v. Earl Dudley, 3 E. & E. 409; *Great Western Railway Company v. Fletcher*, 5 H. & N. 689. See also the judgments in *Caledonian Railway Company v. Sprot*, *ubi sup.*, and *Same v. Lord Belhaven*, 3 M'Q. Sc. Ap. 56.]

land and the adjoining owner, subjacent or adjacent, should be affected.] *

* *Harris v. Ryding* (5 M. & W. 60) was an action on the case for negligently working a mine to the injury of the surface. The surface was granted to the plaintiff's predecessor, reserving the mines with a right of entry to dig for the same, and making fair compensation for the damage to be done to the surface and the crops. The court held, that the exception of the mines vested the whole of the minerals in the grantor, but gave him no right to get them by going on the defendant's land, and that he could not get every particle of them, but must leave a sufficient support for the land above; that the right of entry was no more than a right to use the surface for the purpose of getting at the mines, and did not enable the grantor to get them to a greater extent, or in a manner unusual or improper, so as to prejudice the surface of the land; and that the compensation clause only applied to the exercise of such rights upon the surface. Lord Wensleydale said that the rule of law was that a reservation should be construed strictly, and with reference to the maxim that a person should not derogate from his grant.

*Harris v.
Ryding.*

In *Smart v. Morton* (5 E. & B. 30), the facts were substantially the same as in *Harris v. Ryding*, and the decision was the same, on the authority of that case, which *Jessell*, M R., thinks was not the right course to take. He held that in questions arising on the construction of a written instrument (that is, on the meaning of words which is merely a question of precedent and usage), the judge should decide the case first, and look into the authorities afterwards. (*Aspden v. Seddon*, L. R., 10 Ch. 398.) The latter part of the prescription may perhaps be omitted, as it may make a conscientious judge uncomfortable.

*Smart v.
Morton.*

Roberts v. Haines (6 E. & B. 643) was a case on an Inclosure Act, by which the mines were reserved to the lord. Lord Campbell says, "Before the Inclosure Act the land, down to the centre of the earth, belonged to the lord. He agrees to the Act, and by that he places the allottees of the surface of the inclosed land in the same position as if it had been ancient inclosed land, and the lord had alienated the surface reserving the minerals. In such case, the owner of the surface in general would have a right to the support of the strata below, and it would lie on the mine-owner to show a special right derogating from this. That being so, according to *Humphries v. Brogden*, if the owner of the subjacent strata, working ever so carefully and according to the customary mode, causes the surface to subside, he is liable to an action at the suit of the owner of the surface." The act contained a clause empowering the lord to enter, to search for, dig and raise coal, making compensation. This was held only to authorize ordinary surface damage,

*Roberts v.
Haines.*

By the civil law, this right of support from the neighbouring soil was recognized in the restrictions it

and not to affect the right of support. Another restrictive clause, prohibiting the lord from working within forty yards from a dwelling-house, was held not to derogate from the right of support.

Allaway v. Wagstaff.

Allaway v. Wagstaff (4 Il. & N. 681) was decided on the 1 & 2 Vict. c. 43, an act relating to the Forest of Dean, which enacted, by sect. 68, "That every person entitled to a gale should pay to the owner of any inclosed land compensation for any surface damage by the opening or working of the gale." The court held the section confined to the assessment of compensation for damage done to the surface, and sinking shafts, and making roads, &c. on the surface. They say, "The expression 'surface damage' is a term well known in the north of England in the colliery districts. It is damage to the crops by using the surface, or by the smoke coming from the colliery works or pit heaps, in respect of which compensation is payable under leases or reservations of coal, or when lords work coal by custom under copyhold lands. It is difficult to say that the injury to the foundations of a house, or the subsidence of the soil, is a surface damage; it may be damage to the house and land, but not surface damage."

Bell v. Wilson.

In *Bell v. Wilson* (L. R., 1 Ch. 303), a conveyance of land contained a reservation of all mines or seams of coal, and other mines, metals or minerals, within and under the land conveyed, with liberty to dig, bore, work, lead and carry away the same, and to dig pits and make drifts, and paying a reasonable satisfaction for all damage or spoil of ground to be occasioned thereby. The Lords Justices held, that freestone was included in the reservation, but that the vendor could only take it by underground mines, and could not work it from the surface; since although there were words in the clause which might be construed to extend to authorize workings upon the surface, the clause, taken as a whole, pointed much more strongly to underground workings.

Hext v. Gill.

Hext v. Gill (L. R., 7 Ch. 699). The reservation was of all mines and minerals, with full, free liberty to ingress, egress or regress; to dig and search for, and take, use and work the said excepted mines and minerals, but no provision was made for compensation. The Lords Justices held, that, although the reservation of minerals included every substance which could be got from underneath the surface of the earth for the purpose of profit, and therefore China clay, which could only be got by open working (see also *Midland Railway Company v. Checkley*, L. R., 4 Eq. 23), still the lord was not entitled to take minerals if it involved the destruction of the surface. He must regard the rights of the owner of the surface to the support of the minerals, and that the words of the reservation only gave a right to create temporary damage, and

imposed upon the doing such acts as would naturally have the effect of withdrawing such support: "If a

did not authorize the owner of the minerals absolutely to destroy, or to cause a serious and continuous injury to the surface.

In *Rowbotham v. Wilson* (8 H. Lds. 348) there was a covenant, *Rowbotham v. Wilson.* which the House of Lords construed to be a grant, that the mines should be worked without any molestation of the owner of the surface, and without being subject to any action for damage on account of working or getting the mines, for or by reason that the surface might be rendered uneven or less commodious to the occupier by sinking in hollows, or otherwise defaced or injured, when the mines should be worked. This was held to derogate from the right of support.

In the *Duke of Buccleuch v. Wakefield* (L. R., 4 H. Lds. 377), by *Duke of Buccleuch v. Wakefield.* an Inclosure Act, the mines, minerals and quarries were reserved to the lord, and he was empowered to do all necessary works as he might think proper for working the minerals, in as full a manner as he could have done had the lands remained uninclosed, making reasonable compensation for the damages done. The mineral in question was iron ore, which could not be got without destroying the surface. It was a most valuable mineral, and had been got in large quantities before the Inclosure Act. Taking all the circumstances into consideration, the House of Lords, reversing the decision of *Malins, V.-C.*, came to the conclusion that the lord was entitled, if he found it necessary, for the purpose of getting a valuable mineral, to destroy the surface on making compensation.

In *Buchanan v. Andrew* (L. R., II. Lds., 2 Sc. 286), land was *Buchanan v. Andrew.* granted for the purpose of building, with a reservation to the superior of all minerals underneath, and a stipulation that he should not be liable for any damage that might arise to the surface, or the buildings that might be erected thereon, from working and carrying away the minerals underneath. The House of Lords, reversing the decision of the Court of Session, held, that the superior was not liable for the subsidence of the soil, and the consequent damage to the buildings caused by his working the minerals, so long as he only did what was needful and proper for the getting of the minerals. They referred to and acted upon a previous decision of Lord *Hatherley*, when Vice-Chancellor, to the same effect. (*Williams v. Bagnall*, 1 W. N. 392; 15 W. R. 272.)

To the same effect is *Aspden v. Seddon* (L. R., 10 Ch. 394.) Land *Aspden v. Seddon.* was conveyed for the purpose of building a cotton mill, with a reservation of all mines, seams of coal, ironstone and other minerals, with liberty for the grantor to search for, get, win, take, cart and carry away the same, and to do all things necessary for effectuating all or any of

man dig a sepulchre, or a ditch, he shall leave (between it and his neighbour's land) a space equal to its

the said purposes. The Lords Justices held that they were bound by authority; that those words were not of themselves sufficient to take away the surface owner's right to support. The respondents relied on the words immediately following, "but without entering upon the surface of the said premises, so that compensation in money be made for all damage that should be done to the erections on the said land in the exercise of the said excepted liberties or in consequence thereof." As by the express words of the reservation the mine owner is not to enter upon the plot of land conveyed, the damage to the buildings for which compensation is to be made must be damage caused by the removal of the minerals reserved. It follows, that a right to remove all the minerals, notwithstanding the buildings above might be thereby damaged, was one of the liberties reserved by the deed.

Murchie v. Black.

Murchie v. Black (19 C. B., N. S. 190) was an action for depriving the plaintiff of the lateral support of the defendant's land. The plaintiff and the defendant were the owners of adjoining plots of land, which they had purchased of Graham upon condition that they were to build according to a certain plan; the conveyance to the defendant was first. In digging the foundations according to the conditions he brought down the plaintiff's house. It was held that the contract deprived the plaintiff of his right of support.

Eaton v. Jeffcock.

"The case of a mining lease granted by the owner of both surface and minerals is not analogous to that of a reservation of the mines on a conveyance of the surface. It is a contract entered into between the owner of both surface and minerals and a lessee or licensee for the purpose of removing and making saleable minerals, which form in part what is called the natural support of the soil. This is a contract made by the owner of both for his own profit, and in order that the coal may no longer lie valueless, merely supporting the soil above it, but may be sold by him at a price usually in the form of an acreage rent, which may enormously increase the value of his property. Outside this contract there is no reservation of any right of support, whatever the just nature of that right may be; but we must look at the contract itself, and by a proper construction of it, having regard of course in all cases to the subject-matter, arrive at the extent to which the owner authorizes the minerals to be removed." Above is an extract from the judgment in *Eaton v. Jeffcock* (L. R., 7 Ex. 379). In this case the lease empowered the lessee to win, &c. all the mine—a bed of coal—with certain exceptions; and the court held, that he was not bound in addition to leave enough to support the surface. They considered that *Dugdale v. Robertson* (3 K. & J. 695) was not decided on the same prin-

depth; if he dig a well, he shall leave the space of a fathom" (*s*).

A similar enactment has been introduced into the Code Civil. French law (*t*). "Whoever digs a well or ditch near a wall, whether party or otherwise, whoever wishes to build against (such wall) a chimney, forge, or oven, to erect a stable against it, or establish a magazine of salt, or any corrosive materials, must leave the interval prescribed by law and custom in this respect, or construct the works prescribed by law to prevent injury to his neighbour." In commenting upon this article of the Code, a learned French author says, "It appears Pardessus. to me, that the principle of this Article of the Code (674) should be extended to numerous other cases, which will undoubtedly be settled by particular enactments of the rural laws, and which, until such laws are made, should be decided in conformity with local usages; or, if they are silent, with the precepts of

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(*s*) Si quis sepem ad alienum prædium fixerit infoderitque terminum ne excedito: si maceriam, pedem relinquit; si vero domum, pedes duos; si sepulchrum aut scobem foderit, quantum profunditatis habuerint, tantum spatii relinquit; si putem, passus latitudinem.—L. 13, ff. fin. reg.

(*t*) Code Civil, Art. 674.

ciple as *Shafto v. Johnson* (8 B. & S. 252, n.), and that the correct view was taken in the latter.

Smith v. Darby (L. R., 7 Q. B. 716) is also a case of a mining lease, by which was granted in general terms full liberty to enter and work and take minerals, with this important clause, "the lessees making reasonable satisfaction to the lessors, &c., for the damage done to them by the surface of their land being covered with rubbish or otherwise injured, or as they should sustain as well by the injury done to the lands in sinking and getting the said mines, &c. as for such damage as might be done in the buildings by getting mines of coal under or near them." The court construed the lease as giving the lessees a right to take the minerals absolutely, making compensation.

Smith v. Darby.

equity. Thus, if an individual makes a fish pond or lake on his own property, he ought to leave a sufficient extent of land to separate it from his neighbour who has already a similar reservoir." "By parity of reasoning, the owner of land, who is desirous of quarrying on his own property for stone or sand, or similar materials, must not open the earth at the extreme point which separates his land from that of his neighbour, and continue to excavate perpendicularly, because his neighbour's land, thus deprived of support, would be in danger of falling in (*éboulement*)" (*u*).

§ 2.—*Support to Buildings from adjacent Land.*

Superincumbent buildings.

Where, however, any thing has been done to increase the lateral pressure, as where buildings have been erected, it appears to be clearly settled that no man has a right to such increased support unless the building, or other thing which makes it necessary, is of ancient erection. This was laid down in a very early case.

Wilde v. Minsterley.

"If A. is seised in fee of copyhold land closely adjoining the land of B., and A. erect a new house upon his copyhold land, and any part of his house is erected on the confines of his land adjoining the land of B., if B. afterwards dig his land so near to the foundation of the house of A., but not in the land of A., that by it the foundation of the messuage, and the messuage itself, fall into the pit, still no action lies by A. against B., inasmuch as it was the fault of A. himself that he built his house so near the land of B., for he cannot by his (own) act prevent B. from making the best use of his land that he can (*x*).

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(*u*) Pardessus, *Traité des Servitudes*, 302.

(*x*) *Wilde v. Minsterley*, 2 Rolle's Abr. 564, *Trespass*, Jus-

It was laid down by Lord *Ellenborough* in *Stansell v. Jollard* (y), that where a man had built to the extremity of his soil, and had enjoyed his building above twenty years, upon analogy to the rule as to lights, &c., he had acquired a right to a support, or, as it were, of leaning to his neighbour's soil, so that his neighbour could not dig so near as to remove the support, but that it was otherwise of a house, &c., newly built.

Stansell v. Jollard.

In *Wyatt v. Harrison* (z), the declaration stated that the plaintiff was possessed of a certain dwelling-house—that the defendant, in re-building his dwelling-house adjoining, dug so negligently, carelessly, and improperly into the soil and foundation of his own dwelling-house, and so near the soil and foundation of the said dwelling-house of the plaintiff, that by reason thereof the plaintiff's wall gave way and was damaged. To so much of this declaration as “related to the defendant's digging into the soil and foundation of the said dwelling-house of him the defendant, so near to the soil and foundation of the said dwelling-house of the plaintiff, that by reason thereof,” &c., the defendant demurred generally.

Wyatt v. Harrison.

Lord *Tenterden*, in delivering the judgment of the court, after time taken to consider, said—“The question reduces itself to this—whether if a person builds to the utmost extremity of his own land, and the owner of the adjoining land digs the ground there so as to

tification, J. pl. 1; [but if the fall is caused by the digging only, as in cases where it is proved that the land would have sunk even if the house had not been erected, then the action will lie; see *Hamer v. Knowles* and *Hunt v.*

Peake, ante, p. 360, note (i); and damages for the loss of the house, as well as the subsidence, will be included.]

(y) MS. 1 Sel. N. P. 457, 11th edit.

(z) 3 B. & Ad. 871.

*Wyatt v. Har-
rison.*

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remove some part of the soil which formed the support of the building so erected, an action lies for the injury thereby occasioned? Whatever the law might be, if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance of antiquity might imply the consent of the adjoining proprietor at a former time to the erection of a building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected; and if so, then, according to the authorities, the plaintiff is not entitled to recover. It may be true, that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action; but if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground because mine will then become incapable of supporting the artificial weight which I have laid upon it. And this is consistent with 2 Rolle, Ab. (a). The judgment will therefore be for the defendant" (b).

*Dodd v.
Holme.*

In the case of *Dodd v. Holme* (c), the court did not pronounce any decided opinion as to the right of support for an ancient house from the adjoining land; but *Littledale, J.*, in the course of the argument, observed,

(a) Trespass, J. pl. 1.

(b) In *Smith v. Martin*, 2 Saund. 394 (cited in argument), the declaration was similar to the one in this case, containing no allegation that the house of the plaintiff was an ancient one; but

no point on the law of easements was raised. See in *Langford v. Woods*, 7 M. & G. 625, a count for withdrawing support from an ancient house.

(c) 1 A. & E. 493, post.

“Suppose the house to have been *substantially* built, to have stood thirty or forty years, and to have been kept in proper repair, do you say, that if the defendant, by excavating his adjacent ground, let down that house, though *without actual negligence* on his part, an action would not lie against him?”

*Dodd v.
Holmes.*

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In the case of *Slingsby v. Barnard* (d) the action was brought, not for the withdrawal of support to the plaintiff's house, which was stated in the declaration “to be a modern house, but for digging so near to the foundation of the plaintiff's house that the defendants undermined his house (undermine son mese), by reason whereof one-half of the said house fell into the said pit so dug by defendant Hall.” In the motion in arrest of judgment, which was made upon entirely different grounds, and refused by the court, there is no allusion to any claim of support.

*Slingsby v.
Barnard.*

This principle was fully recognized and acted upon in the recent and very important case of *Partridge v. Scott* (e). The action was brought for an injury to the plaintiff's reversion by defendants' “undermining their own land, wrongfully, carelessly, negligently, and improperly, and without supporting or propping up the same,” and removing the minerals, to the support of which mines and minerals for his premises the plaintiff was entitled; by reason whereof, and by the carelessness and improper conduct of the defendants, the foundation of the plaintiff's premises was injured, the ground gave way, and the walls and houses were damaged. The second count was similar, referring to an injury to another messuage. The defendants pleaded, denying the plaintiff's right to support, as claimed in the de-

*Partridge v.
Scott.*

(d) 1 Rolle, Rep. 430.

(e) 3 M. & W. 220.

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Scott.

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claration. The jury found for the plaintiff, subject to a case. After stating the pleadings, the case proceeded as follows:—"The jury found that the plaintiff was possessed of a certain dwelling-house and premises, partly erected upon excavated land within four years before the injury complained of, being the house and premises to which the second count in the declaration referred, and of other houses, land, and premises, the buildings of which have been erected about thirty years before, and which are those included in the first count.

"They also found that the defendants excavated so near their own boundary (the direction of which boundary was east and west) the mines belonging to themselves, as to cause damage thereby to all the plaintiff's premises, and to cause the adjoining land of the plaintiff, not covered with buildings, to sink also. The defendants began to work their mines after the new house and buildings of the plaintiff had been finished. They sunk their shaft or pit about one hundred yards from the plaintiff's premises on the south side thereof, and worked the coal northward towards those premises.

"The jury also found that, in order to have prevented any injury from the defendants' works to the plaintiff's premises, a rib of coal ought to have been left between those parts of the substrata over which the plaintiff's buildings and premises were situated and the works of the defendants, at least twenty yards in thickness; that the defendants worked their mines, leaving a rib of coal in these places of less than ten yards in thickness, and that they were aware that the coal had been worked out some years before on the north or plaintiff's side of their boundary, where the boundary joined the plaintiff's premises; that in so doing the defendants were guilty

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of negligence in not leaving a rib of sufficient thickness, if the plaintiff was entitled to support from the defendant's land and substrata. The court are to be at liberty to draw any reasonable conclusion which the jury might have drawn. *Partridge v. Scott.*

“ The question for the opinion of the court is, whether, under the above circumstances, the plaintiff is entitled to recover ; and, if he is, then whether he is entitled to damages for the old houses and land alone, or for the more recent erections also ? ” The case having been argued, the court took time to consider : the judgment of the court was delivered by *Alderson, B.*—

“ The two questions in this case are of considerable importance. The facts may be shortly thus stated : The plaintiff was possessed of two houses, one an ancient one, and the other built long within twenty years, before the subject of the present action occurred. These houses were built on the plaintiff's land, and considerably within his boundary ; and the modern house is stated to have been built on land which had been previously excavated for the purpose of getting coal. No such statement appears in the case as to the ancient house, and the court cannot therefore intend that that house was built originally on excavated land, or that the land has been excavated more than twenty years ago.

“ Under these circumstances, the question is precisely similar as to both houses, and is one on which the court do not entertain any doubt.

“ Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds his house at the extremity of his land, he does not thereby acquire any right of easement, for support [224]

*Partridge v.
Scott.*

or otherwise, over the land of his neighbour. He has no right to load his own soil so as to make it require the support of that of his neighbour, unless he has some grant to that effect. *Wyatt v. Harrison* (*f*) is precisely in point as to this part of the case, and we entirely agree with the opinion there pronounced.

“In this case, if the land on which the plaintiff’s house was built had not been previously excavated, the defendants might, without injury to the plaintiff, have worked their coal to the extremity of their own land, without even leaving a rib of ten yards, as they have done. And if the plaintiff had not built his house on excavated ground, the mere sinking of the ground itself would have been without injury. He has, therefore, by building on ground insufficiently supported, caused the injury to himself, without any fault on the part of the defendants; unless at the time, by some grant, he was entitled to additional support from the land of the defendants. There are no circumstances in the case from which we can infer any such grant as to the new house, because it has not existed twenty years; nor as to the old house, because, though erected more than twenty years, it does not appear that the coal under it may not have been excavated within twenty years; and no grant can at all events be inferred, nor could the right to any easement become absolute, even under Lord *Tenterden’s* Act, until after the lapse of at least twenty years from the time when the house first stood on excavated ground, and was supported in part by the defendant’s land (*g*).

(*f*) 3 B. & Ad. 871.

[(*g*) The act does not apply to negative easements at all, and the

right of support for houses, as explained in *Bonomi v. Backhouse* and *Backhouse v. Bonomi*, *supra*,

“ If the law stood as it did before Lord *Tenterden’s* Act (2 & 3 Will. 4, c. 71, s. 2), we should say that such a grant ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts. And even since that act, the lapse of time, under these peculiar circumstances, would probably make no difference. For the proper construction of that act requires that the easement should have been enjoyed for twenty years under a *claim of right*. Here neither party was acquainted with the fact that the easement was actually used at all; for neither party knew of the excavation below the house. We should probably, therefore, have been of opinion that there was no user of the easement under a claim of right; and that Lord *Tenterden’s* Act, therefore, would not apply to a case like this. However, the facts of this special case do not raise that point.

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“ We think, upon the whole, that the defendants are entitled to our judgment.”

[In *Hide v. Thornborough* (*h*), *Parke*, B., said, “ If there was twenty years’ enjoyment by the plaintiff of the support of the house from the defendant’s land, and it was known that the defendant’s land supported the plaintiff’s house, that is sufficient to give him a right of support.” And in *Gayford v. Nicholls* (*i*), *Parke*, B., said, “ this is not a case in which the plaintiff has the right of the support of the defendant’s soil, either by

p. 359, note (*g*), is certainly a negative easement. Such rights are said to come within Lord *Tenterden’s* Act in *Hide v. Thornborough*, *infra*, but when that case

was tried the true nature of the easement of support had not been settled.]

[(*h*) 2 C. & K. 250.

(*i*) 9 Exch. 708.

virtue of a *twenty years' occupation* or by reason of a *presumed grant or presumed reservation*, where both houses were originally in the possession of the same owner, for *unless a right by some such means is established* the owner of the soil has no right of action against his neighbour for the proper exercise of his own right. In *Rowbotham v. Wilson* (*k*), *Bramwell, B.*, said, "after a house has stood in such a position twenty years, it acquires a right to support from the adjoining land.

All these dicta have reference to the support of the *adjacent* soil; and in the cases of *Humphries v. Broyden* and *Bonomi v. Backhouse*, already cited, will be found dicta to the same effect. In the case of *Solomon v. Vintners' Company* (*l*), doubts are expressed by the court upon this subject; but it is to be observed that that case was one of a claim for support of one building by another in a state of things caused by an accidental subsidence of the houses, and not the ordinary case of a house built originally upon the edge of land and obviously so as to be affected by the removal of the adjoining land; the authorities referred to by the court with doubt have reference to such cases as this, and not to such a one as that before the court; see the observations of the Vice-Chancellor *Wood*, in the case of *Hunt v. Peake*, as to this point (*m*).

[*k*] 8 El. & Bl. 140.

[*l*] 4 H. & N. 598.

[*m*] 29 L.J., Ch. 785; 1 Johns. 705. If buildings or other structures be already erected upon the land at the time of the severance, the right of support for them would exist by implied grant; see

judgments in *Dugdale v. Robertson*, 3 K. & J. 695; *Caledonian Railway Company v. Sprot*, 2 M'Q. Sc. Ap. 449; *Richards v. Rose*, ante, p. 117; and if the surface were conveyed for the express purpose of erecting buildings or any other structure, the

It was laid down in the judgment of the Court of Exchequer Chamber, in *Bonomi v. Backhouse* (*n*) (ante, p. 359), that the right of support for buildings when acquired is precisely similar in its character to the natural right of support for the soil, already explained ante, p. 359. This right of support is therefore a negative easement, and does not come within Lord *Tenterden's* Act, but can only be acquired by the common law modes of acquiring such rights (*o*).] *

right of support would also exist. See judgments in *Caledonian Railway Company v. Sprot*, 2 M'Q. Sc. Ap. 449; *North Eastern Railway Company v. Elliott*, 29 L. J., Ch. 808; 1 J. & H. 145; on appeal, 30 L. J., Ch. 160; 2 De G., F. & J. 423; 10 H. of L. 333. The judgment of the Vice-Chancellor *Wood* in the last-mentioned case contains an exposition of the whole law on this subject, and, as he points out, the right acquired in this manner would

not include a right to the continuance of a state of things, though of long standing, clearly of a temporary and accidental character, as, ex. gr., the additional support to the surface caused by the filling of a mine with water by drowning.

(*n*) E. B. & E. 655.

(*o*) That a right by prescription may be claimed in respect of a house, appears from the case of estovers; see 4 Rep. 87 a, 87 b.]

* If land is granted for the purpose of building a house, there is an implied warranty of support subjacent and adjacent from the land of the grantor as if the house had already existed. The extent of the land of the grantor required for the support depends on the nature of the land. If in a quarry of hard stone or marble, it may be that no adjacent support is necessary. If, on the other hand, it traverses a bed of sand or a marsh, or a loose gravelly soil, it may be that a considerable breadth of support is necessary to prevent the land from falling away upon the soil of that which is retained. The same rule applies where the land is conveyed compulsorily under the authority of an act of parliament for a public work, as a railway or canal, unless qualified by the act. (*The Caledonian Railway Company v. Sprot*, 2 Macq. 449; *Caledonian Railway Company v. Belhaven*, 3 Macq. 56.) In these cases it was held that the acts of parliament, under the authority of which the lands were taken, did not qualify the right of support.

In many railway and canal acts, the legislature has provided that the land may be purchased without the minerals; and if the owners

*Caledonian
Railway Com-
pany v. Sprot.*

Some cases in which damages may be reco-

It may be suggested that there are cases in which, though the house be modern, damages may be recovered

give notice of their desire to work them, the company may, if they think fit, make compensation for them. (*Willes, J., Great Western Railway Company v. Fletcher*, 5 H. & N. 700.) In cases within the purview of these acts the right of support is qualified; and if the company will not, upon notice, purchase the minerals, the owner may, acting within the powers of the act, work them, though in doing so he injures the company's works.

Eliot v. North Eastern Railway Company.

In *North Eastern Railway Company v. Eliot* (1 J. & H. 145; 2 De G., F. & J. 423; *Eliot v. North Eastern Railway Company*, 10 H. Lds. 333), the act provided that the minerals under the railway might be worked so that no damage or obstruction should be done to the railway, and if any was done it should be repaired at the expense of the owner of the minerals; and that, whenever in working the minerals the owner should approach within twenty yards of any masonry or building of the company, and the company did not, on notice, purchase the minerals, he might work them in the usual way, but that no avoidable damage should be done to the buildings. The mining operations of Mr. Eliot beyond the prescribed distance of twenty yards being likely to injure the foundations of the company's works, an injunction was granted, *Hood, V.-C.*, holding that the company had no power to purchase the minerals beyond twenty yards, and must be taken to have purchased the right to their support. It was upheld, first by Lord *Campbell, C.*, and afterwards by the House of Lords, for various reasons tedious to enumerate and difficult to explain, on the construction of the act of parliament and the special circumstances of the case.

Wyrley Canal Company v. Bradley.

In *Wyrley Canal Company v. Bradley* (7 East, 368), an action for injuring a canal by mining operations, the act provided that the company should not be entitled to the coal mines, but that the owners should give notice of their intention to work the mines within ten yards of the canal, when the company might compensate them. The court held, that if the company declined to purchase the owners were left to their common law rights as if no canal had been made; that it was not like the case where damages were recovered against the late Earl of Lonsdale for undermining a person's house, for there the party claimed under a grant from the owner of the land, and the injury done was in derogation of the landowner's own grant.

Dudley Navigation v. Grazebrook.

Dudley Navigation Company v. Grazebrook (1 B. & Ad. 59) was a similar action. The act provided that mines should not be worked within twelve yards of the canal without giving the company notice, when they had power to prohibit the working, and, if they did so,

for an injury done to it by digging too near the common boundary. If the owner establishes his right to support for his soil, and the jury should be of opinion that the land would have fallen in, in consequence of the digging, vered though house is modern.

became liable to pay for the mines; and it was further provided that in working the mines no injury should be done to the navigation. The court held that if the mine owner gave notice of his intention to work, and the company did not bind themselves to purchase, he was at liberty to work the mines in the ordinary and usual mode, without doing any unnecessary injury to the company, and in such case was not responsible for damage done to them.

This decision was followed in *Stourbridge Navigation v. Earl of Dudley*, 3 E. & E. 409, and *Birmingham Canal Company v. Earl of Dudley*, 7 H. & N. 969, and *Birmingham Canal Company v. Swindell*, there cited, 7 H. & N. 980, n. The first being an action for an injury to the canal, the second a proceeding for compensation, and the third a bill for an injunction, which was dismissed.

The Railways Clauses Consolidation Act (8 Vict. c. 20, ss. 77—85) contains similar provisions with respect to mines under railways. Under these it has been held, that if the company prevent the owner from working the mines, they are liable to pay him compensation for the loss of his coal. (*Fletcher v. Great Western Railway Company*, 4 H. & N. 242; *Great Western Railway Company v. Fletcher*, 5 H. & N. 689; *Great Western Railway Company v. Bennett*, L. R., 2 H. Lds. 27.) A bill for an injunction to restrain the owner from working his mines has been dismissed. (*London and North Western Railway Company v. Ackroyd*, 8 Jur., N. S. 911; 31 L. J., Ch. 588.)

Railway
Clauses Act.

In *Midland Railway Company v. Checkley* (L. R., 4 Eq. 19), a suit to restrain the working a stone quarry adjoining a canal to the injury of its foundation, Lord Romilly, M. R., held that the company could stop any dangerous working though beyond the prescribed distance, and that whenever they stopped it they were bound to make compensation.

Midland Rail-
way v. Check-
ley.

When a work is authorized for the public benefit, the law does not imply a right of support from the adjacent lands. Thus, where the Commissioners of Sewers were authorized to make a sewer into, through and under any land, making compensation to the owner, and also authorized to take any land or easement they might require, it was held that they had no right of support from the land adjacent to the sewer, in which they had not purchased an easement, though necessary for its support. (*Metropolitan Board of Works v. Metropolitan Railway Company*, L. R., 3 C. P. 612; 4 C. P. 192.)

Metropolitan
Board v. Me-
tropolitan
Railway.

Some cases in which damages may be recovered though house is modern.

even had no additional weight been imposed by building, the value of the house falling with the land might, it seems, be recovered as damage resulting from the principal injury (*p*).

Buildings must be kept in repair.

[226]

Assuming, however, that a right to the support of the adjacent land has been obtained by the enjoyment of an ancient house, it appears that a condition is imposed upon the party entitled to such support, that he shall do nothing within the period requisite for conferring an easement which shall have the effect of increasing the burthen imposed upon his neighbour. Hence, if an excavation be made near an ancient house, which falls immediately afterwards, "if the building fall in consequence of its infirm condition, that would not be a damage by the act of the [defendant (*q*)] excavator:" but, even supposing the building to be so far out of repair, that, "in the ordinary progress of decay, it would have fallen in a short time," it appears from the decision in *Dodd v. Holme*, "that the neighbour had no right to accelerate its fall, by removing its support."*

(*p*) See *Wyatt v. Harrison*, 3 B. & Ad. 871. [This has been decided accordingly in *Stroyan v. Knowles* and *Hamer v. Knowles*, 6 II. & N. 454; and the same

principle is recognized by Wood, V.-C., in *Hunt v. Peake*, 29 L. J., Ch. 785.]

(*q*) Per *Tuunton*, J., in *Dodd v. Holme*, 1 A. & E. 506.

* In an action by a canal company against the owner of adjoining lands for digging clay pits in his land and thereby causing the canal banks to give way, the court held that the company were bound to make and keep in sufficient repair good and proper banks adequate to keep the water in its channel, not only while the adjoining land remained in the state it was when the canal was made, but when it should be applied to those purposes for which it might have been applied by the proprietors before the canal was made. (*Staffordshire Canal Company v. Hallen*, 6 B. & C. 317.)

It is obvious, that if a party claiming such an easement has, during the period of the acquisition of it, done or omitted to do any thing to his own house by which its coherence and capacity to stand unsupported is diminished, or if, by excavating his own soil or other means, he has weakened the support before then afforded by his own soil—so that, to enable it to stand, an additional amount of support is required from the neighbouring land—he has thereby imposed an increased burthen upon it, which there has been no ancient user to oblige the neighbour to submit to; and hence it seems to follow, that if the damage sustained would not have accrued, but for the modern alteration or neglect of the party claiming the easement, he has no right of action, though his house might have stood had there been no excavation—as such continuing to stand could only have been caused by receiving a degree of support from the adjoining soil, which the owner of it was under no obligation to supply. In the case of *Dodd v. Holme*, this point does not appear to have been distinctly considered.*

~~Buildings must~~
be kept in
repair.

No right to
impose addi-
tional burthen,

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The same reasoning would seem to apply to the case of a house originally built in a weak and insufficient manner, in consequence of which it required a greater degree of support than would be requisite for a well-built house.

~~Buildings must~~
be properly
constructed.

Unless there was some external indication of the weakness of the building, the neighbour would be altogether in ignorance, that a greater degree of lateral pressure was exerted than would have been the case,

Buildings must
be properly
constructed.

had the house possessed the ordinary degree of coherence of one well built.

A further objection to the acquisition of an easement of this class by prescription, is the difficulty on the part of the servient owner to offer any effectual resistance, a ground on which considerable stress was laid in the case of *Arkwright v. Gell* (r).

The servient might certainly in all cases withdraw the support, but he is not obliged, in order to resist the claim, to do that which might probably be more injurious to his tenement than the easement itself would have been, [and which, if he did, he could only do at the risk of being held liable by reason that the ground would have sunk in consequence of his operations, even if there had been no buildings; *Hamer v. Knowles*, ante, p. 371.]

In such a state of facts, there is nothing to imply his assent to the enjoyment of the easement by the dominant owner (s).

§ 3.—*Support to Buildings by Buildings.*

[228] A question of equal practical importance, but presenting greater difficulties, and not elucidated by any direct authority, arises where the owner of an ancient house claims a right to have it lean against and be supported by the house of his neighbour.

Clam.

The obstacle to the acquisition of this easement by user, arises from the natural secrecy of the mode of its enjoyment, and the consequent difficulty of showing

(r) 5 M. & W. 203.

(s) *Invitum autem in servitutibus, accipere debemus, non cum*

qui contradicit, sed cum, qui non consentit.—L. 5, ff. de serv. præd. urb.

that it has been had with the knowledge of the owner of the servient tenement.

Clam.

In order to give rise to any question of the existence of this easement, a man must have built to the extremity of his own soil; and supposing him to have built perpendicularly, as he may reasonably be expected to have done, whatever additional pressure may thereby be exerted on the soil, there would be none upon the adjoining house.

Supposing, however, that some deviation from the perpendicular should originally have existed, or have been caused subsequently by the imperfect state of the building, but to so small an extent, or in such a position, as not to be apparent to the owner of the adjoining house, the ignorance of the neighbour would exclude the presumption of that "negligence and patience," from which alone his consent to the imposition of the easement could be inferred.

If, on the other hand, the manner of imposing the pressure be of such a manifest and visible nature, as to afford the requisite indication to the adjoining owner, it would appear, that an easement of this kind may be acquired in the same manner as any other easements; as, for instance, where a beam is inserted in the wall of the neighbour's house; although a further objection would arise from the difficulty on the part of the servient owner in resisting the right thus sought to be acquired.

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From the expression in the judgment in *Peyton v. The Mayor of London* (t), "it did not appear whether the two houses had been erected at the same time, and whether the freehold in both had originally belonged to

(t) 9 B. & C. 736.

Clam.

the same person;" Lord *Tenterden* seems to have inclined to the opinion, that, had such a union existed, an easement of support would have arisen upon their severance.

Such an acquisition of an easement has obviously no connection with the title by prescription, but rather results from the doctrine of the disposition of the owner of two tenements (*u*).

It might also be urged, that such a right to support would be an easement of necessity, as, without it, the house granted or retained could not exist (*x*).

The right of support in cases of this nature was distinctly recognized in the Civil Law (*y*).

Peyton v.
Mayor of
London.

The more ancient authorities appear to be altogether silent upon the point, whether such an easement can be acquired by prescription; and in the only modern case which bears directly upon the subject, the declaration was unfortunately so ill drawn, that the court were not called upon to decide the question of right; and, indeed, in argument, hardly any attempt appears from the report to have been made to maintain the right to support upon the general principles of the law of easements. The facts of this case, the points made in

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[(*u*) See judgment in *Dugdale v. Robertson*, 3 K. & J. 695.

(*x*) See *Richards v. Rose*, ante, p. 117, acc.]*

(*y*) Binas quis ædes habebat unâ contignatione tectas; utrasque diversis legavit: dixi, quia magis placet tignum posse duorum esse,

ita ut certæ partes cujusque sint contignationis, ex regione cujusque domini fore tigna; nec ullam invicem habituros actionem, 'jus non esse immissum habere.' Nec interest, pure utrisque, an sub conditione alteri ædes legatæ sint.—L. 36, ff. de serv. præd. urb.

* Also *Suffield v. Brown*, 4 De G., J. & S. 185; 10 Jur., N. S. 114; 33 L. J., Ch. 249, ante, p. 105.

argument, and the reasons which influenced the court, sufficiently appear in the judgment delivered by Lord *Tenterden*.

*Peyton v.
Mayor of
London.*

“ This was a special action upon the case brought by the plaintiffs, as the reversioners of a house in Cheapside, in the occupation of their tenant under a lease, against the defendants as owners of the adjoining house, for injury sustained in consequence of pulling down the defendants’ house. The first count of the declaration, after alleging the plaintiffs’ interest in a house, which in part adjoined a house of the defendants, charged that the defendants unskilfully, wrongfully, and improperly altered, pulled down, and removed their house adjoining to the plaintiffs’ house, without shoring up, propping, or duly securing the plaintiffs’ house, in order to prevent the same from being injured by the altering, pulling down, and removing of the defendants’ house; so that for want of such shoring up, propping, or otherwise duly securing the plaintiffs’ house, that house was greatly injured, weakened, and in part fell down. The second count, alleging that the houses adjoined and were connected by a party-wall, charged that the defendants so negligently, unskilfully, wrongfully, and improperly conducted themselves in and about the altering, taking away, pulling down, and removing the defendants’ house, that the plaintiffs’ house was, by such negligent, unskilful and improper conduct, greatly weakened, ruined and dilapidated, and in part fell down.

“ The declaration in this case does not allege, as a fact, that the plaintiffs were entitled to have their house supported by the defendants’ house, nor does it in our opinion contain any allegation from which a title to such

*Peyton v.
Mayor of
London.*

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support can be inferred as a matter of law. The complaint also in both counts relates to the fact of taking down the defendants' house, and the manner in which that was done. The first count is evidently framed upon a supposition that it was the duty of the defendants to use the necessary means to sustain the plaintiffs' house when they took down their own; the second count is more general, but it does not charge the want of notice of taking down the defendants' house, in order that the plaintiffs might themselves use the necessary means to sustain their own property, as the injury complained of: and, therefore, in our opinion, the action cannot be maintained upon the want of such a notice, supposing that, as a matter of law, the defendants were bound to give notice beforehand; upon which point of law we are not, in this case, called upon to give any opinion.

"I have been thus particular in noticing the declaration, because it furnishes an answer to much of the learned arguments that were advanced on the behalf of the plaintiffs in support of the rule for a new trial.

"At the trial of the cause before me at Guildhall, it appeared, upon the plaintiffs' evidence, that the two houses were very old and decayed, the party-wall between them weak and defective; that for some time pieces of timber, called struts, have been carried across Honey Lane, on the east side whereof the defendants' house was situate, to the opposite house on the west side of that lane; that the plaintiffs' house adjoined the defendants' eastward; that these struts, by preventing the defendants' house from falling westward, had the effect also of preventing the plaintiffs' house from falling that way; that when the defendants' house was taken down, these struts were necessarily removed, and no

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other and longer struts substituted extending from the plaintiffs' house to the house on the opposite side of Honey Lane, nor any upright shores placed within the plaintiffs' house to sustain the floors and roof without the aid of the party-wall; and if either of these measures had been adopted, the plaintiffs' house might have stood: but that, neither of them being adopted, it soon became separated from the house adjoining to it on the east, and either partly fell or was necessarily taken down, and rebuilt, being injured, dangerous, and uninhabitable. It did not appear whether the two houses had been erected at the same time, or at different times; from their construction, it seems likely that they were built at or about the same time. The freehold was then in different hands; and as the governors of the hospital are not likely to have bought or sold in modern times, it is probable that the freehold was also in different hands when the houses were built. These, however, are but conjectures; if the proof of the facts, either way, would have aided the plaintiffs' case, it was their duty to give the proof.

"It did not appear that the defendants gave any previous notice of the intention of pulling down their house, or of the time of doing so; but the defective state of both houses was known to the parties. There had been previous discussion between them, especially with regard to the party-wall, and a notice of rebuilding the party-wall under the act of parliament had been given, but the defendants' house was pulled down before the expiration of the time mentioned in that notice. The operation of taking down the defendants' house was carried on by day, and the operation must have

*Peyton v.
Mayor of
London.*

*Peyton v.
Mayor of
London.*

been seen and known by the tenant and occupier of the plaintiffs' house.

"Upon these facts appearing at the trial, I was of opinion, at the close of the plaintiffs' evidence, that it was their duty to support their own house by shores within; and upon that ground I directed a nonsuit.

"A rule to show cause for setting aside the nonsuit was granted in the ensuing term; cause was shown, and the matter very well argued on both sides during the present term. We have considered of it; and adverting to the facts proved, and to the want of evidence from which a grant to the plaintiffs of a right to the support of the adjoining house might be inferred, and to the form of the declaration, we think the nonsuit was right, and the rule, therefore, must be discharged" (z).

*Brown v.
Windsor.*

Brown v. Windsor (a) was an action on the case for negligently and carelessly excavating on the defendant's own land, and thereby withdrawing the support from the plaintiff's house, which the declaration alleged it was entitled to. It appeared that, for about twenty-six years, the plaintiff had rested his house upon a pine end wall belonging to the defendant; this had been originally done by permission of the owner of the wall; the defendant, by excavating near his pine end wall, caused it to sink, and thereby injured the plaintiff's house, which rested against it. The jury found that this excavation was made in a careless and unskilful manner; a

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(z) *Peyton v. Mayor of London*, 9 B. & C. 734; see also *Walters and Others v. Pfeil*, 1 Moo. & Mal. 362; *Mussey v. Goyder*, 4 Car. & P. 161. See *Harris v. Ryding*, 5 M. & W.

60, in which it was decided that a person entitled to mines was bound in working them to leave a sufficient support to the surface. See ante, p. 364.

(a) 1 Cr. & J. 20.

motion was afterwards made to set aside the verdict; but, after argument, the Court of Exchequer (*b*) held *Brown v. Windsor.* that the action could be supported.

This case cannot be cited as a direct authority upon the point in question, as the court there clearly assumed, that the plaintiff was entitled to the support he claimed: thus, *Garrow*, B., said, "When such an easement is given, the owner of the premises can only use his rights subject to such easement; and I am of opinion that the allegation as to the easement was established in evidence." "If a party," said *Vaughan*, B., "grant an easement, like the present, and then act so that it cannot be enjoyed, an action lies."

[In the case of *Solomon v. Vintners' Company* (*c*), the Court of Exchequer seems to have been of opinion that if a house gets out of the perpendicular and leans on the adjoining house for twenty years, no right of support would be acquired under such circumstances; but that if the facts of the case had raised the point they might have decided that it would, in deference to *Stansell v. Jollard*, *Hilde v. Thornborough*, and the dicta in *Humphries v. Brogden*. It may be observed that these decisions and dicta, referred to by the Court of Exchequer, appear to refer not to a state of things arising from accidental circumstances and from which no grant can properly be implied, as in the case of the support afforded by the drowning of a mine (*d*), and that any claim of a right of support arising from an accidental sinking of the house might therefore be disposed of without at all interfering with the authority of the

(*b*) *Garrow*, B., *Vaughan*, B.,
and *Bolland*, B.

(*d*) Referred to ante, p. 311,
and p. 379.

[(*c*) 4 H. & N. 585.]

*Brown v.
Windsor.*

decisions doubted by the Court of Exchequer, or the numerous dicta already referred to in accordance with those decisions (*e*).]

*Tigni immit-
tendi.*

By the Civil Law, two servitudes were recognized, the “*servitus tigni immittendi*,” and the “*servitus onera*

[(*e*) It will be observed that in such cases as that put in the judgment in *Solomon v. Vintners' Company*, where the tenement actually leans over the boundary of the adjacent property and rests upon the neighbouring tenement, the easement claimed is a negative not a positive easement, and that the court was of opinion that no right could be acquired to such an easement under Lord *Tenterden's* Act. No valid distinction exists between the case where a house actually leans out of the perpendicular upon the adjacent house, and where it is constructed upon a piece of land, so that the removal of the subjacent land must cause its fall; but the principle of the judgments of the Exchequer Chamber and the House of Lords in *Bonomi v. Backhouse* and *Backhouse v. Bonomi*, *ubi supra*, conclusively establishes that the easement in the latter case, when acquired, is merely a negative easement, and similar in its character to the natural right of support for the soil unencumbered by buildings.

It appears from the arguments in some cases to have been supposed, if the right of support for the soil, or the acquired right of support for buildings thereupon, had been held to be a positive

easement giving the owner of the soil a right of action when so much of the adjacent soil had been removed that it could be found as a matter of fact that insufficient support had been left, though no damage had yet actually occurred, that as the Statute of Limitations must begin to run in respect of that cause of action from the time when such a state of things arose, no right of action would exist for a subsidence occurring more than six years after the removal of the soil which ultimately caused it. It is hardly necessary to point out that this is not a well founded notion, for in the supposed case the easement of the right of support would be an incorporeal hereditament in fee continuing to exist, and binding the successive owners of the servient tenement, and it never has been suggested that there is no remedy for the present infringement of an existing easement, merely because the owner of it has abstained for six years from bringing an action for a former infringement of it. On the other hand, questions of great difficulty will arise in the present state of the law in actions for subsidence caused by the acts of persons who have long ceased to be connected with the land.]

vicini sustinendi," both belonging to this latter class of support of one house from the adjoining house (*f*); the former imposed the liability of support alone, while the latter also imposed the anomalous obligation of repair on the servient tenement; but, even this, the most oppressive servitude known to the law, allowed the servient owner to pull down his house for the purpose of repair, without propping up the dominant tenement, no matter what danger he thereby exposed it to (*g*).

Onera vicini
sustinendi.

In the cases as to the right of support to land and [235] houses from the soil and buildings adjoining, much stress has been laid upon the negligence imputed to the party charged, and some misapprehension appears to have prevailed, at least in argument, with reference to this point. This has probably arisen from the want of precision in the use of the term negligence, which *per se* is insufficient to express the distinction between negligence in law (*h*) and negligence in fact.

Negligence in
law and in
fact.

(*f*) Item urbanorum prædiorum servitutes sunt, ut vicinis onere vicini sustineant; ut in parietem ejus liceat vicino tignum immittere.—I. ff. de serv. s. 1. Vide post, Incidents of Easements.

(*g*) Post.

[(*h*) In the old digests, under the head of actions on the case for negligence, are ranged instances of neglect or breach of duty, in which the proper question for the jury would be simply whether the defendant had done or omitted to do some act, or some result was the consequence of his

act, and not whether he had been guilty of negligence. In such cases it was the practice, in conformity with the precedents (see however, *Smith v. Martin*, 2 Wms. Saund. 400), to allege negligence in the declaration, partly perhaps to show that the count was in case not trespass, partly because of the unsettled state at the time of the law upon the subject. But it is now clear that the allegation of negligence is unnecessary in such cases. Thus in *Bibby v. Carter*, 4 H. & N. 153, a count for taking away support was held good on

Negligence in law always actionable.

Not clear whether negligence in fact may not be so.

Negligence in law is always actionable, but great uncertainty appears to exist as to the cases in which negligence in fact will afford foundation for a right of action. If a man has a right of easement in a support, and his neighbour invades it, he is liable to an action—no matter how carefully he may have done the act complained of; but it is by no means equally clear where a party is not bound by any easement, that he may not be liable for the damage resulting from his negligence in fact.

The first branch of this proposition appears sufficiently obvious. It has been recognized as law in many ancient decisions—that an action lies for any act done by a man in using his own property, whereby the rights of another are injured, unless such act be altogether inevitable and beyond his control.

6 Edw. 4.

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There is a very early case in which this point was expressly decided (*i*). A man brought an action of trespass for breaking and entering his close and treading down his grass. The defendant pleaded not guilty, and also justified the trespass, because he had a hedge of thorns growing on a close adjoining the close of the plaintiff, and at the time of the supposed trespass he

demurred, though negligence was not alleged; and in *Humphries v. Brogden*, 12 Q. B. 739, the count alleged negligence, and, though negligence was not proved, the plaintiff was held to be entitled to recover on it. "If the plaintiff was entitled to the support of the defendant's land, and was deprived of it, the absence of negligence is immaterial." *Browne v. Robins*,

4 H. & N. 193, per *Martin*, B. See acc. *Harmer v. Knowles*, 6 H. & N. 454; S. C. 30 L. J., Exch. 102; *Hunt v. Poake*, 29 L. J., Chan. 787, per *Wood*, V.-C.]

(*i*) 6 Edw. 4, 7, pl. 18; [cited in *Scott v. Shepherd*, 2 W. Blackst. 895; 1 Smith, L. C. 5th ed. 401; its effect stated in *Smith v. Kenrick*, 7 C. B. 563.]

cut the said thorns, and they *ipso invito* fell upon the land of the plaintiff, and that defendant came freshly upon the said land and took them away. To this plea the plaintiff demurred, "and it was well argued and adjourned."

Negligence in
law.

6 Edw. 4.

It was argued on behalf of the defendant, "That if a man does a lawful act, and by reason thereof damage accrues to another contrary to his intention (*encount son volunte*), he shall not be punished; as if I drive my beasts along the highway, and you have an acre of land adjoining thereto, and my beasts enter upon your land and eat the herbage thereof, and I come freshly and chase them out of your land, you shall not have any action against me, because the chasing them was lawful, and their entry upon your land was against my will (*k*). So, in the present case, the cutting was lawful, and the falling upon the plaintiff's land against the defendant's will; and therefore this re-taking was good and justifiable. If I cut the boughs of my tree, and they fall upon a man and kill him, I shall not be attaint as of felony; for my cutting was lawful, and the falling upon the man was against my will."

On the other side, a distinction was taken "between cases where the injury arising from an act is felony, and where it is only trespass, because felony is of malice prepense; and as it was against a man's will, it cannot be done *animo felonico*; but if in cutting my boughs they fall on a man and hurt him, he shall have an action of trespass. So if a man shooting with his bow at the butts, and his bow turn aside in his hands (*son arke swacset en su mein*) and kill a man *ipso invito*, it is not

[(*k*) See next page; per *Littleton, J.*, and *Goodryn v. Chereley*, 4 H. & N. 631.]

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6 Edw. 4.

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felony; but if his arrow hurt a man, an action will well lie, although his shooting was a lawful act, and the hurt of the other was against his will. *Pigott, J.*—If I have a mill, and the water which runs thereto passes over your land, and you have osiers or willows growing along the water side, and you cut the willows and they fall into the stream and stop it, so that I cannot have sufficient water for my mill, I shall have an action, notwithstanding the cutting was lawful, and they fell into the stream against your will. So if a man hath a pond in his manor, and lets off the water in order to catch the fish therein, and the water surrounds my land, I shall have an action, though the doing so by him was lawful.” *Young, J.*, was of opinion that “no action lay, because the property in the thorns being still in the defendant, his entry to take them away was not tortious, and that the plaintiff had sustained damage *sine injuriâ*.” *Brian, J.*—“In my opinion, when a man doth any act, he is bound to do it in such a manner as not to injure another man. If I build a house, and while the timber is being raised up a piece of timber falls upon my neighbour’s house and breaks it down (*debruse sa meason*), he shall have an action against me, though the raising the timber was lawful, and the falling and injury against my will. So too if a man make an assault upon me, and I cannot avoid him, and as he is coming to beat me, I raise my stick in my own defence to strike, and another man is behind me, and in raising my stick I strike him, he shall have an action against me.” *Littleton, J.*, said, “that the case of the beast put by the defendant’s counsel was not law; but if a man’s cattle do damage by eating the herbage, &c., he must pay for it, or they may be dis-

trained damage feasant, though they could not be taken by the lord for his rent, as the owner would be entitled to have them back again upon tender of reasonable amends. If the law be as is contended in respect to thorns, it must be so for trees also; and a man might enter with his carts to take it away if it fell into his neighbour's field, notwithstanding the neighbour had wheat or other herbs growing there. The law is the same for great and small things; and the amends shall in all cases be according to the quantity of damage done." *Choke*.—"Where the principal thing was not lawful, that which dependeth upon it is not lawful. When the thorns were cut and fell on the plaintiff's land, the falling was unlawful, and therefore defendant's coming to fetch them was unlawful likewise; and as to his saying that they fell *ipso invito*, that is no plea at all; but he ought to say that he could not do otherwise, or that he did all that lay in his power to keep them out, or otherwise he shall pay damages. But if the thorns or a large tree had fallen by the force of the wind, in this case he might have entered and taken them, the falling being caused not by his act, but by the wind" (1).

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6 Edw. 4.
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So, in *Weaver v. Ward* (m), in an action of trespass and battery, the defendant pleaded "That he was skirmishing in the London trainbands *in re militari*, and accidentally, and by misfortune, and against his will, in discharging of his piece, did hurt and wound the plaintiff." Upon demurrer, judgment was given for the

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Ward.

[(1) See also *Taylor v. Stendall*, 7 Q. B. 634, in which the defendant was held liable both for the destruction of his neighbour's

wall by the accidental fall on to it of the defendant's, and also for having rebuilt the wall.]

(m) Hobart, 134.

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law.

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plaintiff: "For though it were agreed that if men tilt or tourney in the presence of the king, or if two masters of defence, playing their prizes, kill one another, that this shall be no felony, or if a lunatic kill a man, or the like—because felony must be done *animo felonico*: but in trespass, which tends only to give damages according to hurt or loss, it is not so; therefore, if a lunatic hurt a man he shall be answerable in trespass; and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged utterly without his fault; as if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it appeared to the court to have been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."*

Rolle Abr.

Thus in 1 Rolle's Abridg. (*n*), it is said, 1. "If my fire by misfortune burn the goods of another man, he shall have an action on the case against me." (2 Hen. 4, 18.)

2. "If the fire light suddenly in my house, I knowing nothing of it, and burn my goods and also the house of my neighbour, my neighbour shall have an action on the case against me." 42 Ass. 9: admitted, but it seems it was adjudged there that the action did not lie because it was *vi et armis*.

3. "If my servant puts a candle or other fire in a place in my house, and it falls and burns all my house

(*n*) Tit. Action sur Case, B. p. 1, Vin. Abr. Actions for Fire, B.

and the house of my neighbour, action on the case lies against me by him (2 Hen. 4, 18); and the law is the same if my guest should do it." (2 Hen. 4, 18) (o). Negligence in
law.

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Ward.

6. "But if a stranger against my will puts a fire in my house, no action lies against me."* (2 Hen. 4, 18 b.)

(o) The law was altered as to the liability for accidental fire [by 6 Anne, c. 31, and 14 Geo. 3, c. 78, s. 86. These enactments do not extend to cases of fires occasioned by negligence; *Williter v. Whip-pard*, 11 Q. B. 347. See *Blenk-*

iron v. Great Central Gas Consumers Company, Q. B. Nov. 15, 1860, 3 Law T., N. S. 317; 2 F. & F. 437, where the fire spread to the plaintiff's house from the intervening house of a third person.]

* 7. An action upon the case does not lie against baron and feme for negligently keeping their fire in their house, by which the house of the plaintiff was burnt, because the action lies upon the general custom of the realm against paterfamilias (the housekeeper), and not against a servant, or a feme covert who is in the nature of a servant. (1 Car. at Reading, between *Shulley* and *Burr*, 1 Roll. Abr. Action sur Case, fol. 2; Vin. Abr. Action for Fire, B.) Rolle Abr.

The case in Year Book, 2 Hen. 4, 18, is *Sir Wm. Beaulieu v. Roger Finglam*. The declaration alleged that every person, by the custom of the realm, shall keep his fire safely and securely, and is bound so to keep it lest any damage happen to his neighbour, and that Roger so negligently kept his fire, that for want of due keeping the said fire the goods and chattels of William were consumed by the fire of Roger. An objection was taken to the manner in which the custom was alleged, but the court held that the common law of this realm is the common custom of this realm. *Thirning* said, "He shall answer for his fire that by accident burns the goods of others." This does not appear to have been assented to by the court. His authori-
ties.
Beaulieu v.
Finglam.

Markham said, "A man is, in such cases, bound to answer for the act of his servant or his guest; for if my servant or my guest puts a candle in a window and the candle sets fire to straw and burns my house and the house of my neighbour, I shall be responsible to my neighbour," which was agreed to by the court.

Markham said further, "I shall answer to my neighbour for him who enters my house by my leave or knowledge, but if a man out of my house against my will sets fire to straw in my house whereby my house and that of my neighbour is burned, I shall not be responsible, because that cannot be said to be ill on my part but against my will."

Negligence in
law.

*Turberville v.
Stampe.*

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So, in *Turberville v. Stampe* (*p*), which was an action against the defendant for so negligently and carelessly keeping the fire in his field, that it communicated to the plaintiff's adjoining close of heath and burnt it. After verdict for the plaintiff, defendant moved in arrest of judgment, and it was said, "That in fact in this case the defendant's servant kindled this fire

(*p*) 1 Ld. Raym. 264; Com. 32; 281; Cases temp. Holt, 9; Carth. 1 Salk. 13; 12 Mod. 151; Skin. 425; Comb. 459 (M. 9 W. 3).

In Bro. Abr. Accion sur le Case, pl. 30, fol. 5, the case is thus abridged. It was said, that if I or my servant, or he who comes to my house with my assent, puts a candle so negligently that it burns the houses of myself and neighbour, I shall recompense my neighbour his damage; otherwise of fire by misfortune and without *negligence*, or of one who comes to my house against my will and does the mischief, to which the court agreed.

In *Ross v. Hill* (2 C. B. 889), *Tindal*, C. J., said, that the common law duty to keep fire safely and securely only meant that it should be kept with a reasonable degree of care; and in *Pigot v. Eastern Counties Railway Company* (3 C. B. 241), he describes the case of *Beaulieu v. Finglam* as an action for negligently keeping fire.

Ass. 42 Edw. 3,
pl. 9.

The other Year Book referred in Rolle, Ass. 42 Edw. 3, pl. 9, p. 259, is, "A man sued a bill against another for burning his house *vi et armis*. The defendant pleaded not guilty. It was found by the verdict of the inquest that the fire broke out suddenly in the house of the defendant, he knowing nothing of it, and burned his goods, and also the house of the plaintiff; wherefore upon this verdict it was adjudged that the plaintiff should take nothing by his writ but should be amerced."

28 Hen. 6,
P. fo. 7, pl. 7.

In another Year Book (28 Hen. 6, 7) is reported an action brought because the plaintiff's house was burned by the fire of the defendant, by reason of the *default* of the defendant in not properly keeping his fire.

From these authorities it would appear that the common law obligation as to fire only bound a man to take reasonable care that the fire lit by himself or his servant, called *his* fire, did not injure his neighbour. The Year Book, 42 Ass., does not support Rolle's Abridgement. The statement that a man is responsible for his guest is only a dictum, and when it was attempted to turn it into a decision the attempt failed (*Allen v. Stephenson*, 1 Lut. 90)

by way of husbandry, but that a wind and tempest rose and drove it into the plaintiff's field;" and the court said (*q*), "The fire in his field is his fire, as well as that in his house. He made it, and must see it does no harm, and answer the damage if it does. Every man must use his own so as not to hurt another; but if a sudden storm had arisen which he could not stop, it was matter of evidence, and he should have shown it."

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law.
Turberville v.
Stampe.

So, in *Comyns' Digest* (*r*), it is said, "An action lies for misfeasance, though the damage happen by misadventure." One of the authorities cited by Comyns is a case in *Croke* (*s*), of a man shooting with a gun at a bird, and thereby lighting a fire which consumed his neighbour's house.

Com. Dig.

"If a man," says *Gibbs*, C. J., in *Sutton v. Clarke*, "for his own benefit makes an improvement on his own land, according to his best skill and diligence, and not foreseeing that it will produce any injury to his neighbour, if he thereby unwittingly injure his neighbour, he is answerable" (*t*).

Sutton v.
Clarke.

The case of *Vaughan v. Menlove* (*u*) was an action brought by the plaintiff for an injury to his reversion, occasioned by the defendant making a rick of hay on his own land near some cottages of the plaintiff, which was "liable and likely to ignite, take fire, and burst out into a flame, of which the defendant had notice, by means whereof the said rick did ignite, take fire, and burst into flame, and by flame issuing therefrom the plaintiff's cottages were set on fire, and thereby through

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(*q*) 1 Salk. 13.

(*r*) Action upon the case for misfeasance, A. 4.

(*s*) Cro. Eliz. 10.

G.

(*t*) 6 Taunt. 44. See also *Taylor v. Stendall*, 7 Q. B. 634.

(*u*) 4 Scott, 214; S. C., 3 Bing. N. C. 468.

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Menlove.*

the carelessness, negligence, and improper conduct of the defendant, in so keeping and continuing the said rick in such condition, the said cottages were burnt down." The defendant pleaded not guilty—that "the said rick or stack of hay was not likely to ignite, take fire, and break out into flame, nor was the same, by reason of such liability, dangerous to the plaintiff's cottages, nor had the defendant notice thereof"—and other pleas, which denied that the damage occurred through the defendant's negligence.

It appeared at the trial, that the rick in question had been made by the defendant near the boundary of his own premises; that the hay when put together was in such a state as to cause persons to warn the defendant that there was danger of its taking fire; that he made some attempts to prevent this by making a chimney in the rick; that the rick burst into flames from the spontaneous ignition of the materials, and the flames communicated to and destroyed the plaintiff's cottages.

Patteson, J., left it to the jury to consider "Whether the fire had been occasioned by gross negligence on the part of the defendant;" adding, "that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances." The jury having found for the plaintiff, a rule for a new trial was obtained, on the ground that the proper question to have been left to the jury was, whether the defendant had acted *bonâ fide* to the best of his judgment, the standard of "ordinary prudence" being too uncertain to afford any criterion.

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The argument went entirely on the question of negligence; and the decisions upon the degree of caution required in taking negotiable instruments were relied

on for the defendant (*x*). The court discharged the rule, *Tindal*, C. J., said, "I agree that this is a case of the first impression; but I feel no difficulty in the application to it of the principle upon which the determination of it must rest. This is neither a case of contract nor a case of bailment, where the degree of care which the party is called upon to exert is measured by the nature and character of the bailment. But the case falls within the general rule of law, which requires that a man shall so use his own property as not to injure or destroy that of his neighbour, and which renders him liable for all the consequences resulting from the want of due care and caution in the mode of enjoying his own. Under the particular circumstances of this case, I feel no hesitation in holding the defendant to have been as much the raiser of the fire as if he had put a lighted match to the hay rick; for it is well known that hay stacked in a green or damp condition will from natural causes ferment and ignite.

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"In *Turberville v. Stampe*, an action was held to be maintainable under circumstances very similar to those of the present case: 'Case on the custom of the realm, quare negligenter custodivit ignem suum in clauso suo, ita quod per flammam blada quer. in quodam clauso ipsius quer. combusta fuerunt.' After verdict pro quer., it was objected, the custom extends only to fire in a house or curtilage (like goods of guests), which are in his power. Non alloc.; for, the fire in his field is his fire, as well as that in his house: he made it, and must see that it does no harm, and answer the damage if it does. Every man must use his own so as not to hurt

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[(*x*) As to which see the notes to *Miller v. Race*, 1 Smith, L. C. 5th ed. 465—471.]

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another. But if a sudden storm had arisen, which he could not stop, it was matter of evidence, and he should have showed it. And *Holt, Rokesby* and *Eyre*, against the opinion of *Turton*, who went upon the difference between fire in a house, which is in a man's custody and power, and fire in a field, which is not properly so; and it would discourage husbandry, it being usual for farmers to burn stubble, &c. But the plaintiff had judgment, according to the opinion of the other three.'

"Put the case of a chemist, mixing substances which alone are perfectly innocent, but which are liable to explode on coming into contact, and thereby occasioning damage to his neighbour: who could for a moment doubt that the injured party would have a remedy by action? I am clearly of opinion that the damage in this case was properly the subject-matter of an action.

"But it is contended that the learned judge mistook the extent of the defendant's liability; and that, under the particular circumstances of this case, the defendant was not bound to adopt such measures as a man of ordinary prudence would have resorted to for the purpose of averting the threatened danger; but that it was sufficient if he acted according to the best of his own individual judgment; and therefore the learned judge ought not to have left the case to the jury as one of gross negligence, but should have left it to them to say whether or not the defendant had acted honestly and *bonâ fide* according to the best of his judgment. The first observation that suggests itself, in answer to that argument, is, that, seeing the infinite gradations of intellect and judgment, the doctrine contended for would lead to an inconvenient vagueness and uncertainty in a

[244] case which perhaps, more than all others, requires that

the rights and liabilities of the parties should be well and accurately defined. Negligence in
law.

“It is said, that there is nothing intelligible in the rule which has in many cases obtained, requiring from a party under circumstances analogous to those of the present case, the exercise of that degree of care which a prudent and cautious man would be expected to use. Such, however, has always been the rule in cases of bailment, as laid down by Lord *Holt* in *Coggs v. Barnard* (y), though in some cases of bailment a smaller, in others a greater degree of diligence and care are exacted. That learned judge says, ‘In the second sort of bailment, viz. commodatum, or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender; because the bailee has a benefit by the use of them; so, if the bailee be guilty of the least neglect, he will be answerable; as, if a man should lend another a horse to go westward, or for a month, if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him; but if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse.’

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“It is for the jury to say whether or not, under the circumstances, the party has conducted himself with such a degree of care and caution as might be looked for in a prudent man; and such was in substance the direction of the learned judge. To hold the degree of care to be sufficient if co-extensive with the judgment of the individual, would introduce a rule as uncertain [245]

(y) 2 Lord Raym. 909 [1 Smith, L. C. 5th ed. 171].

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as it is possible to conceive. In the present case, it appears to me that the defendant not only failed to observe the degree of care and caution that the law required of him, but was guilty of very gross negligence. I therefore think the rule must be discharged."

Park, J.—"I am of the same opinion. Although the facts in this case are novel, they clearly bring it within the rule of law, that a man shall so use his own property as not to do injury to his neighbour. The case of *Turberville v. Stampe* is, in principle, very like the present, though in its circumstances more like the case that was tried in Berkshire, as alluded to by my brother *Talfourd*.

"The direction of the learned judge seems to me to be perfectly correct. It clearly was proper to leave it to the jury to say whether or not the defendant was guilty of gross negligence; and I think their finding was well warranted by the evidence."

Gaselee, J.—"My Lord Chief Justice and my brother *Park* having gone so fully into the matter, it is not necessary for me to say more than that I entirely concur with them. The action is clearly consistent with the principle upon which the decisions referred to turned."

Vaughan, J.—"The principle upon which we hold this action to be maintainable is by no means new. It is at least as old as *Turberville v. Stampe*. It has been strenuously urged that the law cast no duty upon the defendant under the circumstances. To that, however, I cannot agree. It clearly was his duty, whilst enjoying his own premises, to take care that his neighbour was not injured by any act or neglect of his. It appears to me that the defendant's conduct was such that no jury would be warranted in coming to any other con-

clusion than that he had been guilty of *gross* negligence: for, when the condition of the stack, and the probable and almost inevitable consequence of permitting it to remain in its then state, were pointed out to him, he abstained from the exercise of the precautionary measures that common prudence and foresight would naturally suggest, and very coolly observed that 'he would chance it.' That which might be expected under the circumstances to have been the conduct pursued by a prudent and careful man has always been taken for the criterion in cases analogous to the present. For example, in actions on policies of assurance, where the ship or goods, the subject-matter of the adventure, have been sold by the master for the benefit of the concerned, the question left to the jury has invariably been, whether or not the course pursued by the master has been such as a prudent and cautious man, having a due regard to the interest of all parties, ought, under the peculiar circumstances, to have adopted. In this case I think the jury would not have found for the plaintiff, unless they had been satisfied that the defendant had been guilty of gross negligence; a conclusion to which all the evidence directly pointed."*

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* There were several actions for negligence in keeping fire about the same time as *Turberville v. Stampe*. In all of them negligence was charged; and from the disastrous consequences to the defendant, they were thought to be hard actions. In one a new trial was denied, though the verdict was against evidence, and disapproved by Lord Holt, before whom it was tried, because it was a hard action. (*Smith v. Brampton*, M., 7 W. 3, 2 Salk. 644; 1 Ld. Raym. 62; 5 Mod. 87.) In another, an action for burning six stables through negligently keeping fire, one of which the defendant held of the plaintiff as tenant at will, he was held not liable for the destruction of the one he held as tenant, but liable with respect to the others. (*Pantam v. Isham*, P., 13 W. 3, 1 Salk. 19; 3 Lev. 359.)

Mischief by
fire.
Cases before
statute of
Anne.

Negligence in
law.

It may be remarked with reference to this case, that the question of negligence in fact was raised by every

Mischief by
fire.

In another (*Allen v. Stephenson*, H., 11 W. 3, 1 Lutw. 90), the declaration alleged, that, by the custom of England, every housekeeper was bound by day and night safely and securely to keep the fire of himself, his servants and lodgers, that no damage should be done to any others; and that the defendant, being a housekeeper, admitted a lodger into his house, who so negligently kept his fire there, that, for the want of good keeping of the fire thereby of the lodger, the goods of the plaintiff were burned. After verdict for the plaintiff judgment was arrested for the strangeness and insufficiency of the declaration—a decision that a housekeeper was not responsible for the negligence of his lodger in this respect. *Cudlip v. Rundall* (T., 2 W. & M., 4 Mod. 9; 12 Mod. 14; Holt, 410; 1 Show. 310; Carth. 202; Comb. 177; 3 Salk. 156), and *Hicks v. Downling* (M., 8 W. 3, 1 Salk. 13; 2 Salk. 734; 3 Ld. Raym. 354), are cases for injuries by fire between landlord and tenant.

6 Ann. c. 31.

These cases probably caused the passing of the stat. 6 Ann. c. 31—“An Act for the preventing Mischiefs that may happen by Fire.” After providing that parties shall protect themselves against fire by proper walls, sect. 3 recites, that fires often happen by the negligence and carelessness of servants, and enacts, that if any menial or other servant or servants shall fire, or caused to be fired, any dwelling-house or outhouses or houses, such servant or servants shall forfeit and pay 100*l.* to the churchwardens of the parish to be distributed amongst the sufferers. And by sect. 6, no action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house or chamber any fire shall from and after the 1st day of May next accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby, any law, usage or custom to the contrary notwithstanding. Sect. 7, nothing in the act contained shall extend to defeat or make void any contract or agreement between landlord and tenant. Sect. 8, so much of this act as relates to the indemnity of any person in whose house or chamber any fire shall accidentally begin, shall continue for the space of three years and from thence to the end of the next session of parliament and no longer.

Origin of fire
insurance.

About this time the business of fire insurance began or was extended. “About the year 1709, some persons observing that great benefits accrued to the public by insurances made in the cities of London and Westminster against losses of houses by fire, but that such insurances did not extend to other parts of England, nor were there any insurances against losses of goods by fire, they formed a society for that purpose, which was called the Sun Fire Office, and the under-

issue on the record; and as there was evidence sufficient to satisfy the minds of the jury that the conduct Negligence in
law.

taking was from that time so successfully carried on, that hundreds of families have been thereby saved from ruin." (*Lynch v. Dalzell*, 4 Brown, P. C. 431, Tonlin's edit.) By this system parties were enabled to obtain an indemnity against loss by fire by contributing a small annual sum to a joint stock. Mischief by
fire.

It may have been to ascertain whether the business of fire insurance could be established that the act was made temporary. It was revived and made perpetual by 10 Ann. c. 14 (1711), after the experiment had succeeded. Continuation
of statute.

6 Ann. c. 31 was repealed by 12 Geo. 3, c. 73, a metropolitan building act, but sects. 6 and 7 was re-enacted in the same words (sect. 37). This statute was in its turn repealed, together with the statute of Anne, by 14 Geo. 3, c. 78, which contains similar provisions to those of sects. 6 and 7 of 6 Ann., with this difference, instead of the words "any person in whose house or chamber any fire shall accidentally begin," the words are "any person in whose house, chamber, *stable, barn or on whose estate* any fire shall accidentally begin." (Sect. 86.) This enactment has been expressly saved from repeal by the subsequent building acts (7 & Vict. c. 84, s. 1, schedule (A), and 18 & 19 Vict. c. 122, s. 109), and has been held to be a general law extending to the whole kingdom. (*Richards v. Easto*, 15 M. & W. 244.)

At the end of the report of *Turberville v. Stamp*, in Cases temp. Holt, 9, the reporter adds—"N.B. The statute of Anne; query, if the above action would lie at this day? It is not within the words and perhaps not within the reason of this act of parliament." The necessary words were added by 14 Geo. 3, c. 78. Comments on
statute.

In Bac. Abr. (Action on the Case, F., vol. I, p. 104) it was formerly holden, that if a fire broke out accidentally in a man's house and raged to that degree as to burn his neighbour's, he in whose house the fire first happened was liable on the general custom of the realm, *quod quilibet ignem suo salvo*, &c. But now by the 6 Ann. c. 31, ss. 6 and 7. Com. Dig. Action on the Case for Negligence, A. 6, is to the same effect. Bac. Abr.

Blackstone (1 Com. 431) says, by the common law, if a servant kept his master's fire negligently, so that his neighbour's house was burnt down thereby, an action lay against the master, because this negligence happened in his service; but now the common law is altered by the stat. 6 Ann. c. 31, which ordains that no action shall be maintained against any in whose house or chamber any fire shall accidentally begin, for their own loss is sufficient punishment for their own or their servant's carelessness. Blackstone.

Negligence in law. of the defendant was not that of a man of ordinary care and prudence, the court were not called upon to

Mischief by fire.

Hargrave.

Hargrave, in a note to Co. Lit. 57 a, says, at the common law, lessees were not answerable to landlords for accidental or negligent burning. Then came the Statute of Gloucester, which, by making tenants for life and years liable for waste (without any exception) rendered them answerable for destruction by fire. Thus stood the law in Lord Coke's time, but now by the stat. 6 Ann. c. 31, the ancient law is restored, and the distinction introduced by the Statute of Gloucester between tenants at will and other lessees is taken away.

Lord Tenterden.

Lord Tenterden, in delivering the judgment of the court in *Beckett v. McCarthy* (2 B. & Ad. 958), says, "By the law of this country before it was altered by the stat. 6 Ann. c. 31, s. 6, if a fire began on a man's own premises by which those of his neighbour's were injured, the latter, in an action brought for such injury, would not be bound to show in the first instance how the fire began; but the presumption would be (unless it were shown to have originated from some external cause) that it arose from the neglect of some person in the house."

It does not appear that any action was brought for negligence with respect to fire between the passing of 6 Ann. c. 31, and the case of *Vaughan v. Menlove* in 1837, with the exception of one tried in Berkshire before Baron Alderson for burning weeds in a field, whereby the adjoining plantation was destroyed, in which the plaintiffs succeeded. The provision of the Building Act was not referred to in *Vaughan v. Menlove*, and it was treated by Tindal, C. J., as a case of the first impression.

Visc. Canterbury v. Reginam.

On the occasion of the fire at the Houses of Parliament, the Speaker presented a petition of right to the crown praying for compensation for his effects thereby destroyed, on the ground that the fire originated through the negligence of the servants of the crown. Lord Lyndhurst, after referring to the statute of Anne and the construction put on it by Blackstone, says, although this work (the Commentaries) has gone through many editions and been subject to much criticism, no observation that I can find has ever been made on this passage or any objection urged against it. I may further observe, that although cases of damage by the burning of houses occasioned by negligence have doubtless been of frequent occurrence since the statute, I do not recollect, in the course of a pretty long professional life, any instance of an action being brought to recover compensation for this species of injury, nor do I find in the books any trace of such a proceeding. He also referred to the passage in Bac. Abr., as putting the same construction on the statute in a work nearly contemporaneous. (*Viscount Canterbury v. Reg.*, 1 Phil. 306.)

decide the question of his liability at all events for the consequences of his own act. In the case of *Tur-* Negligence in law.
Bona fides no justification.

Williter v. Phippard (11 Q. B. 347) was an action for the defendant wrongfully lighting a fire in his close, which through his negligence spread to the plaintiff's and burnt his hedges. After verdict for the plaintiff the defendant moved in arrest of judgment, on the ground that he was exempt from liability by 14 Geo. 3, c. 78. The court held that the term "accidental" in the statute meant a fire produced by mere chance and incapable of being traced to any cause, and did not extend to a fire, the result of negligence; and they further observed, that the fire in the case before them did not begin accidentally, but was knowingly lighted by the defendant himself. Mischief by fire.
Williter v. Phippard.

Many actions have recently been brought against railway companies for injuries caused by fire from their engines. In the only one in which the statute was brought in question, the Court of Exchequer held that the statute did not apply where the fire originated in the use of a dangerous instrument knowingly used by the owner of the land in which the fire breaks out. (*Vaughan v. Taff Vale Railway Company*, 3 H. & N. 751.) The judgment was reversed by the Exchequer Chamber, but nothing was said on this point. There is also a note of the reporters in *Aldridge v. Great Western Railway Company* (3 M. & G. 524), that no question was raised as to any protection afforded by 14 Geo. 3, c. 78, either in that case or *Vaughan v. Menlove*. Fire from railway engines.

In these actions against railways, it has been held, that the legislature, having sanctioned and authorized the use of locomotive engines propelled by means of fire, if every precaution has been taken to prevent injury, the sanction of the legislature carries with it the consequence, that if damage results from the use of the engine independently of negligence, the company is not responsible. (*Vaughan v. Taff Vale Railway Company*, 5 H. & N. 679, overruling judgment of Exchequer, 3 H. & N. 743.) *Vaughan v. Taff Vale.*

Aldridge v. Great Western Railway Company (3 M. & G. 515) and *Piggot v. Eastern Counties Railway Company* (3 C. B. 229), occurred before the last case and before *Williter v. Phippard*. They were actions for negligently managing locomotives, whereby sparks flew out of them to the plaintiffs' lands and destroyed their property.

The first was a special case, which stated that the engines used upon the railway were such as were usually employed for the purpose of propelling trains, and that the engine from which the sparks flew was being used in the ordinary manner and for purposes authorized by the act of parliament. The court held that they could come to no conclusion on the facts stated in the case. *Tindal*, C. J., was not prepared *Aldridge v. Great Western.*

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*Piggot v.
Eastern
Counties.*

berville v. Stampe, the validity of which is so fully recognized, no exception is made on the ground of the

to say that the fact of the engine emitting sparks might not amount to negligence.

In *Piggot v. Eastern Counties Railway Company*, there was evidence that the company might have taken a precaution against sparks flying from their engine, which they omitted. *Alderson, B.*, in leaving the case to the jury, told them that the company were bound to use all reasonable means to prevent accidents, and not to tax their engines beyond their powers, and that the emission of ignited particles in the way described by the witnesses was evidence that the engine was over-worked. The jury found for the plaintiff and the court refused to disturb the verdict. *Tindal, C. J.*, said, "The defendants are a company entrusted by the legislature with an agent of an extremely dangerous and unruly character for their own private and particular advantage. The law requires of them that they shall, in the exercise of the powers so conferred, adopt such precautions as may reasonably prevent damage to the property of third persons through or near which their railway passes. The evidence showed that the injury of which the plaintiff complained was caused by the emission of sparks or particles of ignited coal coming from one of the defendant's engines, and there was no proof of any precaution adopted by the company to avoid such a mischance." (See also *Gibson v. South Eastern Railway Company*, 1 F. & F. 23.)

*Fremantle v.
London and
North
Western.*

Fremantle v. London and North Western Railway Company (10 C. B., N. S. 89). There was a conflict of evidence as to whether the company had used all proper precautions in the management of their engine. *Williams, J.*, directed the jury that they were bound not only to employ all due care and skill for the prevention of damage to the property of others, but to avail themselves of all the discoveries science had put within their reach for that purpose, provided they were such as under the circumstances it was reasonable for them to adopt. The court approved the summing up and upheld the verdict, saying, there was a conflict of testimony on the question of degree, which was necessarily for the jury.

*Longman v.
Grand
Junction
Canal.*

In *Longman v. Grand Junction Canal Company* (3 F. & F. 736), it was left to the jury to say whether the company had been guilty of negligence, which was defined to be the neglect of any reasonable practical precautions which the company reasonably ought to have used to prevent the emission of sparks from their engines.

*Dimmock v.
North Staf-
fordshire.*

In *Dimmock v. North Staffordshire Railway Company* (4 F. & F. 1058), *Keating, J.*, adopted the summing up of *Williams, J.*, in *Fremantle v. London and North Western Railway Company*; and the jury

defendant's having acted *bonâ fide*; in fact, it would appear from the observations of one of the learned Negligence in law.

having found that there was no negligence of the company in respect of the engines or their mode of using them, or in the use of coke or otherwise, he directed a verdict for the defendants, which was upheld. **Mischief by fire.**

In *Smith v. London and South Western Railway Company* (L. R., 5 C. P. 98; 6 C. P. 14), the company had left some dry grass and trimmings of hedges by the side of the line, which were ignited by their passing engines, and the fire spread to the plaintiff's cottages 200 yards off. It was decided that their leaving substances which were likely to take fire by the side of the railway was evidence of negligence, and there being evidence of negligence, they were liable for all consequences, whether they could have foreseen them or not. ***Smith v. London and South Western.***

In *Jones v. Festiniog Railway Company* (L. R., 3 Q. B. 733), the company used a locomotive steam engine, with no express parliamentary powers for so doing. It was held that they were bound to keep the engines from doing injury, and were liable for the damage caused by the escape of fire from the engine, though no actual negligence was shown, on the same principle as that on which a man who keeps an animal of known dangerous propensities, or a dangerous instrument, is responsible to those who are injured by it, independently of any negligence in the mode of dealing with the animal or using the instrument. ***Jones v. Festiniog.***

In addition to accidents resulting from the use of fire by private persons in their houses for the purposes of heat or light, or in their fields for burning rubbish, and by railway companies for propelling their engines, they sometimes arise from the use of gas by gas companies, who send it through mains and pipes into houses for their own profit and the convenience of their customers, and sometimes under the authority of parliament. **Gas explosions.**

In *Holden v. Liverpool Gas Company* (3 C. B. 1), the defendants were established under an act of parliament and had supplied gas to the plaintiff's house. His tenant gave them notice that he would not be liable for any further supply, and afterwards in consequence of the pipes in the plaintiff's house being removed by a stranger, the gas from the defendant's main escaped into the house and exploded. The plaintiff was nonsuited by *Cresswell, J.*, on the ground of contributory negligence. He held that the plaintiff's tenant was identified with himself and was responsible for not having the stop-cock in the house properly turned. The court confirmed this ruling, and held also that as their act of parliament did not require the company to turn off the gas when a customer gave them notice to discontinue their supply, the common law did not impose such duty upon them, or any other duty than that of using proper and sufficient care in the supply of gas. ***Holden v. Liverpool.***

Negligence in judges in that case, that the fire was not the result
 law. of negligence, but was lighted for the purposes of

Mischief by
 fire.

*Blenkiron v.
 Gas Con-
 sumers.*

In *Blenkiron v. Gas Consumers Company*, the defendants were charged with negligence in laying on gas in premises contiguous to the plaintiff's, whereby the said premises were set fire to and flames spread to the plaintiff's house. The court on demurrer held the defendants liable for the spread of the fire, which began by their negligence. (3 L. T., N. S. 317.) On the trial, *Cockburn*, C. J., left it to the jury whether there was negligence on the part of the defendants' men either in omitting to do something, which, in the exercise of ordinary care and skill they ought to have done, or in doing an act dangerous in itself under circumstances in which it was not consistent with ordinary care and prudence that it should be done. The jury found for the defendants on the ground that they had used all reasonable precautions. (2 F. & F. 437.)

*Mose v. Hast-
 ings and St.
 Leonards.*

In *Mose v. Hastings and St. Leonards Gas Company* (4 F. & F. 324), gas escaped from the defendants' mains and exploded in the plaintiff's house. *Pollock*, C. B., directed the jury that it was the duty of all gas companies to use due and reasonable care to prevent mischief from its escape and explosion, and that the company not sending for several days to ascertain whether there was any escape, during which there had been a leakage, was evidence that they had not exercised such care. The plaintiff recovered.

*Burrows v.
 March.*

Burrows v. March Gas Company (L. R., 5 Ex. 67, 7 Ex. 96) was a case of contract. The defendants had agreed to supply the plaintiff with a sufficient pipe and had not done so, whereby an explosion occurred through the servant of a gasfitter employed by the plaintiff incautiously using a light. The Exchequer Chamber held the defendants liable on two grounds: first, for supplying a defective pipe; and, secondly, for sending gas through it, and that the negligence of the persons employed by the plaintiff was not contributory negligence by him.

Custom.

The law as to the liability of persons for injuries caused by fire is founded upon custom—a custom which existed in the time of Henry IV. A custom is not

“A strict statute and strong biting law,
 Which for these fourteen years we have let sleep,
 E'en like an o'ergrown lion in his cave
 Who goes out forth to prey.”

It is a law of every-day life, which is constantly being exercised and enforced. We may infer that this custom had been acted upon in repeated instances in or before the time of Henry IV., and that its

husbandry. In the case of the chemist, supposed by *Tindal*, C. J., he would [no doubt] be equally liable, Negligence in
law. -----

origin could not then have been traced. The rough freeholders who met in the county courts to decide each other's cases had evolved it from their common sense of justice. Some portions of the common law may originate in the decrees of parliaments, or kings, the records of which have perished or were never written; others in the decisions of judges founded on their knowledge of the civil law or their ideas of right. A custom springs from the people. Many cases on the subject are reported from the reign of Edward III. to that of William III. In the latter reign they were very numerous, and attracted great attention, almost every case being reported by several reporters. Then came the statute of Anne, after which for 130 years they disappear from the reports. These accidents are then again made the subject of litigation. The statute of Anne and its successors are first forgotten, then explained away.

Mischief by
fire.

Effect of sta-
tute of Anne.

The law of damage resulting from fire probably is the first in which the maxim of universal jurisprudence—*sic utere tuo ut alienum non lædas*—was applied in the English law. The seed from which the whole crop of cases relating to the care to be taken of things capable of doing damage to others (everything has this capability more or less) has grown. It has been compared by *Tindal*, C. J., to a bailment (*Ross v. Hill*, 2 C. B. 889); also to the case of an unruly horse, a mad bull, an unmuzzled mastiff (*Piggot v. Eastern Counties Railway Company*, 3 C. B. 240); by *Cockburn*, C. J. (*Vaughan v. Taff Vale Railway Company*, 5 H. & N. 685), and again by *Blackburn*, J. (*Jones v. Festiniog Railway Company*, L. R., 3 Q. B. 737), to that of keeping an animal of known dangerous propensities; and in *Fletcher v. Rylands* (L. R., 1 Exch. 280), *Blackburn*, J., following Lord Holt (*Tenant v. Goldwin*, 1 Salk. 361), treats the case of the escape of water, brought by a man on his land for his own purposes, as the same as that of cattle straying in search of food. Like all similes, the resemblance holds good in some leading feature, but not in every particular. In the case of a bailment, a man having the general property in a chattel entrusts it to another for a special purpose, giving him a special property, and he is bound to take a reasonable degree of care, with reference to the purpose of the bailment, that the thing bailed shall not be lost or injured, to the prejudice of the property of the bailor. A man who has the absolute property in a thing has not an unlimited right to it. His right is surrounded on all sides by the rights of others. He is entrusted with it by the law,—made, or supposed to be made, with the consent of all his fellows,—on condition that he takes such reasonable care of it, with reference to its nature, that it does

Negligence in law. whether the injury was caused by the experiments he was making, or by his carelessness in leaving the materials in a situation liable to ignite.

Mischief by fire. not trespass on the rights of others. The surrounding rights of others correspond with the succeeding right of the bailor in the case of a bailment. In the case of a mischievous animal, the owner is not responsible for any mischief done, unless he knows of its propensity and keeps it notwithstanding; and so if mischief is done by an inanimate thing, the keeper should have previous knowledge that the mischief complained of was likely to result from its use. But the case of fire is not the same as the case of a wild animal taken from its native forest and kept out of mere curiosity, or of an useless and mischievous dog. In such cases, if the owner cannot keep them from injuring others, he ought not to keep them at all. Fire is a necessary of life; without its heat we could not live for a week; without its light during the autumn, winter and spring evenings and fogs we should rust in sloth; without the power, of which it is the prime agent, used in making goods and moving them swiftly from place to place, our commercial greatness and usefulness to the world would cease. It ought not, then, to require an act of parliament to privilege a man to use it with ordinary or extraordinary care, and exempt him from responsibility as an insurer against any mischief it may do.

Mischief by other things. In other cases where a thing in the custody of one man comes in contact with the person or property of another to his injury, there must be evidence of negligence, though sometimes the accident itself is *prima facie* evidence of negligence—"res ipsa loquitur." The occupier of a house on a highway, who permits it to be so much out of repair that it is ready to fall on the Queen's subjects, is indictable for a nuisance. (*Reg. v. Watson*, 2 Ld. Raym. 856; S. C. nom. *Reg. v. Watts*, 1 Salk. 357.) A barrel of flour fell from the defendant's shop on the plaintiff whilst passing along a highway. It was held *prima facie* evidence of negligence on the part of the defendant. *Follock*, C. B., says, "I think it is apparent that the barrel was in the custody of the defendant, who occupied the premises, and who is responsible for the acts of his servants, who had the control of it; and, in my opinion, the fact of its falling is *prima facie* evidence of negligence, and the plaintiff, who is injured by it, is not bound to show that it would not fall without negligence; but if there are any facts inconsistent with negligence it is for the defendant to prove them." (*Byrne v. Doadle*, 2 H. & C. 722.) Bags of sugar fell on a custom-house officer whilst passing in front of a warehouse in the docks. The Exchequer Chamber held it to be evidence of negligence on the part of the dock company. They say, when a thing is shown to be under the management of the defendant

The civil law appears to agree with these authorities : Negligence in
 " If from the roof of a house, tiles thrown down by the law.

or his servants, and the accident is such as in the ordinary course of Mischief by
 things does not happen if those who have the management use proper other things.
 care, it affords reasonable evidence, in the absence of explanation by
 the defendants, that the accident arose from want of care. (*Scott v.*
London Dock Company, 3 H. & C. 596; see per Lord *Chelmsford*,
Moffatt v. Bateman, L. R., 3 P. C. 122.) The decision was the same
 where a packing-case of the defendant standing against his warehouse
 fell upon the plaintiff. (*Briggs v. Oliver*, 4 H. & C. 403.) And
 where a loose brick from a railway bridge fell on the plaintiff, *Kelly*,
 C. B., says, "It was the duty of the defendants who built the bridge
 to take such care, that when danger can be reasonably avoided,
 the safety of the public shall be provided for. A brick fell out of the
 bridge without any assignable cause, except the slight vibration of a
 passing train. This was conclusive evidence that it was loose. The
 bridge had been built two or three years. It was the duty of the
 defendants from time to time to inspect the bridge, and ascertain that
 the brickwork was in good order and all the bricks properly secured."
 (*Kearney v. London and Brighton Railway Company*, L. R., 5 Q. B.
 411; 6 Q. B. 759.)

If the accident is not apparently the result of negligence, negligence Res ipsa non
 must be proved. Thus, where a plank and roll of zinc fell on a man who loquitur.
 went to look at a time-table at a railway station from the station roof,
 and it appeared that there was a man on the roof, his legs being seen,
 it was held, that there was no evidence of negligence to charge the
 railway company, because the man might have been employed as a
 contractor for whom the company were not liable, or have let the
 things fall by mere accident. (*Welfare v. Brighton Railway Company*,
 L. R., 4 Q. B. 693.)

In *Ayles v. South Eastern Railway Company* (L. R., 3 Ex. 146),
 where there was a collision of trains on the defendants' railway, over
 which other companies had running powers, the court presumed, in the
 absence of evidence to the contrary, that the train in fault was under
 the control of the defendants, and the negligence of its driver their
 negligence. *Randerson v. Murray* (8 A. & E. 109) was decided on
 the same principle, viz., that where mischief is done by a thing being
 used upon a building in the course of the business of the occupier, it
 may be presumed to have been set in motion by the occupier's servant.
 Although observed upon when cited for other purposes (per *Maule, J.*,
 in *Peachey v. Rowland*, 13 C. B. 186, and per *Pollock, C. B.*, *Murphy*
v. Caralli, 3 H. & C. 465), the case has never been impeached on this
 ground.

Negligence in law. — wind should cause damage to a neighbour, the owner of the house is liable, if it happen through any defect of the house; but not if it happens through the violence of the winds or other act of God—*Quâ aliâ ratione, quæ vim habet divinam:*” and the reason is given for the limitation of the rule: “Without this restriction the law would be unjust, for it is impossible to make a building so strong as to resist the force of a river, the

Mischief by other things. Scienter.

In *Murphy v. Caralli* (3 H. & C. 462), the defendant had inscenrely piled bales in a warehouse, which a few days afterwards fell on the plaintiff while there in the course of the business of the warehouseman. The defendant was held not liable, because there was nothing dangerous to the plaintiff in his act, without the subsequent act of the warehouseman in allowing the plaintiff to approach the bales. In *Collis v. Selden* (L. R., 3 C. P. 195), the defendant was charged with negligently hanging a chandelier in a public house, knowing that the plaintiff was likely to be there and under the chandelier, and that the chandelier, unless properly hung, was likely to fall on the plaintiff, and that it fell on and injured the plaintiff while lawfully in the house. The court held, that he was not liable, on the ground that he owed no duty to the plaintiff. *Borill, C. J.*, said, that they could not infer that there was anything in the nature of a public nuisance, and there was no breach of contract, and nothing in the nature of fraud or misrepresentation. *Willes, J.*, said, that the declaration should have shown that the chandelier was a thing dangerous in itself and likely to do damage, or that it was so hung as to be dangerous to persons frequenting the house. These cases may be considered as decided in favour of the defendants, on the ground that when they did the acts complained of, they did not know of and could not be said to contemplate the mischief which ensued.

Sharp v. Powell (L. R., 7 C. P. 253) was decided on the same principle. The defendant washed his van in the street during a frost. The waste water froze. The plaintiff's horse slipped on the ice and broke his leg. The defendant was held not liable, because the accident was not the ordinary and likely consequence to result from his permitting his van to be washed in the public street.

And where a man was impeded in performing a contract by an escape of water into his employers' land, the court held that he could not sue, because the wrongdoer was only liable for the proximate and direct consequence of the wrongful act. (*Cattle v. Stockton Waterworks Company*, L. R., 10 Q. B. 453.)

sea, a tempest, a fire, or an earthquake" (z). The only exception mentioned in another place is inevitable accident (a). This is expressed in our law by the maxim, "Sic utere tuo ut alienum non lædas;"—a maxim equally applicable to an easement, when once legally acquired, as to any of the rights of property [248] instanced in these decisions. It can scarcely be contended, that the careful manner in which a wall was built, could be any defence for the obstruction of an ancient window, if such be the consequence of its erection; or that an excavation, which caused the fall of an ancient house, could be justified on the ground that all possible precaution was taken to guard against such an accident.

Negligence in law.

The further question now remains to be considered, whether a man acting in the exercise of his undoubted rights of property, and doing damage to his neighbour, which under some circumstances might be justifiable, is liable to an action if the damage might have been prevented by the use of reasonable care and precaution on his part.

Negligence in fact.

(z) Servius quoque putat, si ex ædibus promissoris vento tegulæ dejectæ damnum vicino dederint, ita cum teneri, si ædificiî vitio id acciderit, non si violentiâ ventorum, vel quâ aliâ ratione, quæ vim habet divinam. Labeo et rationem adjicit: quod si hoc non admittatur, iniquum erit: quod enim tam firnum ædificium est, ut fluminis, aut maris, aut tempestatis, aut ruinæ, incendii, aut terræ motûs vim sustinere possit.—L. 24, § 4, ff. De damno infecto.

contra ea damnum datum est, cui nullâ ope occurri poterit, stipulationem non tenere.—Ibid. § 8.

Si damni infecti ædium mearum nomine tibi promiserô, deinde hæc ædes vi tempestatis in tua ædificia ceciderint, eaquo diruerint, nihil ex eâ stipulatione præstari; quia nullum damnum vitio mearum ædium tibi contingit; nisi forte ita vitiosæ meæ ædes fuerint, ut quâlibet vel minimâ tempestate ruerint. Hæc omnia vera sunt.—Ibid. § 10.

(a) Cassius quoque scribit, quod

Negligence in
fact.

This question also turns upon the application of the maxim, "Sic utere tuo ut alienum non lædas;" and as it is not contested, that in the interpretation of this maxim, "alienum" must be taken to mean, "the *rights* of the neighbouring owner;" and that, therefore, no action can be maintained unless both injury and damage are sustained: the real point to be decided is—whether in the absence of any easement restricting the neighbouring owner, a party has a right to impose upon such owner a limitation as to the mode of doing a thing, which is one of the undoubted rights of property, and the performance of which he clearly has no right to prevent.

Damnum et
injuria must
concur.

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"If a man sustains damage," says *Bayley, J.*, "by the wrongful act of another, he is entitled to a remedy: but, to give him that title, these two things must concur—damage to himself and a wrong committed by the other. That he has sustained damage is not of itself sufficient." *Rex v. Commissioners of the Pugham Level (b)*.

Thus, supposing there were two modern houses, and the owner of one were desirous of pulling down his house, the consequence of which, if done in the most convenient and economical manner, would be damage to the neighbouring house, by suddenly withdrawing the support which it had hitherto received, but to which it had no claim; while a more gradual withdrawal of the support might not have been attended with the same danger;—has the neighbouring owner any right of action against him if he do not adopt the latter mode?

Vagueness of
doctrine.

Some modern authorities would appear to answer this

(b) 8 B. & C. 355; [and the notes to *Ashby v. White*, 1 Smith, L. C. 5th ed. 215—251.]

question broadly in the affirmative, and to lay it down as being in every case at large for the decision of the jury, whether a reasonable degree of caution has been exercised. The inconvenience that must result from the absence of some more precise and definite rule of law is obvious. A man could scarcely exercise upon his own land one of the most ordinary rights of property without exposing himself to an action for damages: the event of which would depend upon the varying opinion of a jury, founded on the proverbially conflicting testimony of surveyors (*c*). Negligence in
fact.

As the case put supposes that no easement has been acquired, the party must have been in the enjoyment of that to which he had, by law, no title, and which enjoyment the neighbouring owner might at any time have determined by his own act (*d*). [250]

Where, however, a party chooses to obtain a remedy by his own act, without having recourse to law, a condition is imposed upon him, that he shall use no unnecessary violence. If, therefore, a beam be wrongfully inserted into a neighbouring house, or the outer walls cohere either from the cement or the bricks dovetailing, the party proposing to remove the beam or the bricks improperly inserted in his wall must use no unnecessary violence; and in this respect it must obviously be immaterial whether his object be simply to resist the usurpation, or, in addition thereto, to remove his whole building, either with or without an intention to reconstruct it. Care in removing encroachments.

Beyond this, it appears difficult to see on what prin-

(*c*) *Walters v. Tfeil*, 1 Moo. & M. 362; *Trower v. Chadwick*, 3 Bing. N. C. 334; 3 Scott, 609.

[(*d*) *Gayford, App., Nicholls, Resp.*, 9 Exch. 708.]

Negligence in
fact.

Care in removing
encroachments.

[251]

*Walters v.
Pfeil.*

ciple any restriction can be imposed upon a party in the free use of his own property, so long as he confines himself strictly within its limits (*e*). There are, however, cases which have been adduced as authorities opposed to this doctrine, such as the case in which air has been corrupted by gas and other works; but in these instances there is a clear invasion of common right: and, therefore, the analogy seems to fail. A man requires an easement to entitle him to the lateral passage of light and air; but he requires no easement to give him a right of action against his neighbour who immits upon his land air in a corrupted state, and thus commits a quasi trespass upon him. The real ground of action in this case is not what he does on his own, but what he does on the complainant's land; not the rendering the air impure, but the transmitting it in that state to his neighbour.

In *Walters v. Pfeil* (*f*), it appeared that the plaintiffs or their tenants had neglected to take any precaution, by shoring up their houses within, or in any other way, against the effects of pulling down the de-

(*e*) See *Davis v. London and Blackwall Railway Company*, 1 M. & G. 799, and *Bradbee v. Christ's Hospital*, 4 M. & G. 714. See the judgment of *Tindal*, C. J., in the latter case on the thirteenth objection. "The declaration charges the defendants with conducting themselves so carelessly, negligently and improperly, in pulling down their house, and in neglecting to use proper precautions in that behalf, that large quantities of brick, mortar, &c. fell from the defen-

dant's house into and upon the plaintiff's house, broke the windows, &c." "The plaintiff, therefore, complains not of some mere omission on the part of the defendants, but of their doing certain acts in so negligent a manner that by those very acts the plaintiff's house was injured." So in *Davis v. The Blackwall Railway Company*, the charge was that the defendants caused a house to fall against the plaintiff's.

(*f*) Moo. & Malk. 362.

fendant's house adjoining; and it appeared that this might have been so done, that the accident would not have happened to the same extent. There was, also, evidence to show that the accident was owing to the bad foundations of the plaintiff's houses; but there was conflicting evidence as to whether, by due care on the part of the defendant's workmen, the mischief might have been entirely avoided.

Negligence in
fact.

Walters v.
Pfeil.

Lord *Tenterden*, C. J., in summing up, said, "It is now settled that the owner of premises adjoining those pulled down must shore up his own in the inside, and do everything proper to be done upon them for their preservation. That has not been done here; and it seems that if it had been, it would have given security. Still the omission does not necessarily defeat the action; if the pulling down be irregularly and improperly done, and the injury is produced thereby, the person so acting may be liable for it, although the owner of the house destroyed may not have done all that he ought for his own protection. If, therefore, you think that the house of the defendant was pulled down in a wasteful, negligent, and improvident manner, so as to occasion greater risk to the plaintiffs than in the ordinary course of doing the work they would have incurred, then I think the defendant liable to make compensation for the consequences of his want of caution; if you think that fair and proper caution was exercised, then the defendant will be entitled to a verdict."

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In *Dodd v. Holme* (g) the action was brought for digging the foundations of an intended building on a

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(g) 1 A. & E. 493; 3 Nev. & Man. 739. [As to this case, see *Humphries v. Brogden*, 12 Q. B. 749; and in *Gayford*, App., the observations of the court in *Nicholls*, Resp., 9 Exch. 708.]

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piece of land next adjoining an ancient house of the plaintiffs', so carelessly, &c., that the walls and foundations of the plaintiffs' ancient house sank and gave way: the other counts were similar—and all, except the last, stated it to be an ancient house. At the trial it appeared that the house was ancient, and that the defendants excavated on their own ground, being about four feet from the plaintiffs' house. After the excavation, the plaintiffs' gable wall bulged—the defendants made an ineffectual attempt to shore it up, but it gave way in all directions, and it became necessary to rebuild it. On the part of the plaintiffs evidence was given, that if the wall had been shored properly, and in time, it would not have given way. On the part of the defendants evidence was given, that the wall was in so rotten a state that it could not have been effectually shored, and was pressed upon by a great weight of rubbish on the plaintiff's premises, and that, even if undisturbed, it could not have stood six months. It appears, also, to have been contended, that if a man build to the extremity of his own land, antiquity of possession would not give him any right "to prevent a neighbour from using his own land lying adjacent." The learned judge stated the law to be as follows:—

[253] "If I have a building on my own land, which I leave in the same state, and my neighbour digs in his land adjacent so as to pull down my wall, he is liable to an action. If, however, I had loaded my wall so that it had more on it than it could well bear, he would not be liable. And he stated the question for the jury to be, whether the fall was occasioned by the defendants' negligence or by its own infirmity, in which latter case they should find for the defendants." The jury found a ver-

dict for the plaintiffs. In Michaelmas Term following a new trial was moved for, on the "ground, that the learned judge had misdirected the jury, inasmuch as they might have been led by the summing-up to suppose, that the mere act of digging near the plaintiffs' land, in consequence of which the wall fell, was negligence, for which an action lay, unless the wall was improperly loaded; whereas the real question was, whether the work had been done by the defendants in a negligent manner, or with as much care as the circumstances allowed: it was also contended that it should have been left to the jury, whether the house was built in such a manner as a man ought to build a house at the extremity of his own land, in order to have an action against his neighbour, if any such action would lie, for injury occasioned to the house by the neighbour digging in his own soil." A rule *nisi* having been obtained, in the course of the argument, it having been denied that the antiquity of the house gave any right to support from the adjoining soil, *Littledale, J.*, observed, "Suppose the house to have been substantially built, to have stood thirty or forty years, and to have been kept in proper repair, do you say, that if the defendant, by excavating his adjacent ground, let down that house, though without actual negligence on his part, an action would not lie against him?" The rule for a new trial was discharged. The judgments of the judges were as follows:—

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"Lord *Denman*, C. J.—The case, as presented to the court, involves some curious points, which, however, it is not necessary to decide. The declaration charges that the plaintiffs were possessed of a house, and that the defendants so negligently and carelessly dug their

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foundations in the land next adjoining the land on which the said house was built, that the walls thereof sank and gave way. The question is—if those allegations were proved, and if it was properly left to the jury whether they were or were not proved. The real point in the case was, the cause of the damage sustained by the plaintiffs. It is impossible not to see that the question, what that cause was, involves the consideration of the state in which the plaintiffs' house was at the time of the act done by the defendants. Upon that subject a great deal of evidence was given, and, no doubt, properly impressed upon the jury; and I think it was substantially left to them in the charge of the learned judge, whether or not the result complained of was caused by the negligent act of the defendants. It being so left to them, I think, upon the balance of evidence, no other result could have been expected than the verdict they gave; the damage having occurred so soon after the act complained of. A man has no right to accelerate the fall of his neighbour's house. Without, therefore, entering into the general question of law as to the right of a party building on the edge of his

[255] own soil, or the question whether twenty years' occupation is an essential part of such right, on which I give no opinion, I think the question in this case was fairly left to the jury, and the verdict a proper one.

“*Littledale, J.*—I think that the plaintiffs' house, having stood more than twenty years, might be considered as an ancient house. What difference that might make under other circumstances, it is unnecessary now to say: the plaintiffs had, at all events, acquired certain rights; and the complaint in this action is, that the defendants, by their negligence, occasioned a loss to the

plaintiffs, which was a prejudice to those rights. The learned judge appears, by his report, to have put the case to the jury in language like that used by this court in their judgment in *Wyatt v. Harrison* (r). I do not find that he left it prominently as a question, what was the state of the building; but that must have been a matter submitted to them; for, in inquiring whether the injury was owing to the neglect of the defendants, the state of the premises must have been a part of the consideration. I am of opinion that there is no ground for a new trial.

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“ *Taunton, J.*—The question in the cause was merely one of fact, and I cannot see in what respect the jury have drawn a wrong conclusion. In every count of the declaration it is stated that the defendants did the act complained of negligently, carelessly, and unskilfully, and that by reason thereof, that is, of such negligent and improper conduct, the damage was occasioned. A very long inquiry was gone into at the trial, how far the defendants had acted negligently or cautiously, upon which the jury have formed their conclusion; and they must be taken to have decided, according to the averments in the declaration, not only that there was negligence in the defendants, but that, by reason of such negligence, the damage accrued. It was said, that the house, if undisturbed, might not have stood six months; but if that was so, still the defendants had no right to accelerate its fall: six months’ enjoyment was of some value, and the defendants had no right to deprive the plaintiffs even of that short-lived existence of their dwelling-house. If the building had fallen down

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merely in consequence of its infirm condition, that would not have been a damage by the act of the defendants; but the jury have found otherwise, and I think the evidence supports their finding. As to the summing-up, the learned judge has stated it briefly in his report, and may not recollect every observation he made; but, considering the length of time occupied by the cause, and the quantity of evidence gone into, it is impossible, even if the judge had been silent on the point, that the jury should have omitted to consider whether or not the act of the defendants was done by them negligently; and, without looking narrowly, and, as Lord *Kenyon* used to say, 'with eagles' eyes,' at the words used by the learned judge, I think we are justified in saying, that the minds of the jury were sufficiently directed to the question how far the damage complained of arose from the improper act of the defendants.

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"*Williams, J.*—I am of the same opinion; and I think it is clear from the learned judge's report, that the attention of the jury was drawn to that which was the real subject of inquiry. Much evidence was given to show that the injury was occasioned by the faulty state of the house, and not by the negligent proceeding of the defendants; that question must have been fully before the jury, and there was nothing in the summing-up to withdraw it from their notice. The bad condition of the house would only affect the amount of damages. If it was true that the premises could have stood only six months, the plaintiffs still had a cause of action against those who accelerated its fall: the state of the house might render more care necessary on the part of the defendants not to hasten its dissolution. There was evidence of an actual neglect in them; and,

upon the whole, there is reason to think that the jury drew the proper inference.”

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The [more] recent case of *Trower v. Chadwick* (s) supports the first principle above laid down; but the judgment [of the Court of Common Pleas] on the second count in this case [is] to the effect, “That, although a man may have no right to support from the buildings of his neighbour, yet, if the latter chose to withdraw it, he must take reasonable and proper care in doing so, and, for negligence and unskilfulness in doing so, he is liable to an action.”

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It is, however, to be observed, that this case was decided on demurrer; and therefore the duty of the defendant being alleged, if such duty could in any case be imposed by law, it was admitted by the demurrer (t); and this case might be supported by a state of facts, in which the defendant, in pulling down his own house, had interfered with, or removed with unnecessary violence, materials belonging to the plaintiffs’ house, and standing on the plaintiffs’ own ground. Unless the language of the Chief Justice is confined to some such case as that here suggested, it might have the effect of preventing the owner of a house from pulling it down even for the purpose of repair, if the necessary consequence were, that the adjoining house would fall

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(s) 3 Bing. N. C. 334; S. C. 3 Scott, 699; [reversed in error, 6 Bing. N. C. 1; S. C. 8 Scott, 1. In the Exchequer Chamber the validity of the first count was not questioned, and the court held the second count to be bad, and therefore, there having been a trial of the cause, and a general assess-

ment of damages, granted a venire de novo.]

[(t) As to the immateriality of an averment of a duty, the existence of which the facts alleged do not disclose, see *Brown v. Mallett*, 5 C. B. 599; *Seymour v. Maddox*, 16 Q. B. 326.]

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—although such adjoining house were of recent and insecure erection—unless he took precautions, as by shoring or otherwise, to prevent injuring his neighbour—a burthen clearly not imposed upon him by law (*u*).

The facts of the case, and the points made, appear fully in the following elaborate judgment of *Tindal*, C. J.—

“ This is an action on the case, the declaration in which contains two counts, in the first of which the plaintiffs allege their possession of a certain vault or cellar adjoining to certain other vaults and walls, and which in part rested upon and was of right supported in part by parts of the adjoining vaults and walls; and that the plaintiffs were of right entitled that their vault or cellar should be so supported in part; and that there are certain foundations belonging to and supporting the said vault or cellar, which the plaintiffs ought to enjoy; yet that the defendant wrongfully took down and removed the said vaults and walls so adjoining to the vault or cellar of the plaintiffs, without shoring or propping up, or taking other reasonable or proper precautions to support or secure it, so as to prevent its being weakened or destroyed, and wrongfully dug the earth and disturbed the foundations, without taking due and proper precautions to prevent the said foundations from being weakened and giving way; and the declaration

[259] then states the injury which the plaintiffs sustained, and the special damage which followed thereon. The second count states that the defendant was about to pull down the adjoining vaults and walls, and alleges it

[(*u*) See *Chauntler v. Robinson*, 4 Exch. 163.]

to have been the duty of the defendant, in the event of his not shoring up the walls, to give notice to the plaintiffs of his intention to pull down, and also his duty to use due care and skill, and, to take due, reasonable, and proper precautions about pulling down his vaults and walls; and then alleges a breach of such duty.

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“ To this declaration the defendant pleads thirteen pleas, of which the first seven are pleaded to the first count either in part or in whole; and the eighth and subsequent pleas are pleaded in like manner to the second count of the declaration.

“ The plaintiffs demur to the fourth, fifth, sixth, seventh, eighth, eleventh, twelfth, and last pleas, assigning certain causes of special demurrer to each; and, the defendant having joined in demurrer, the first question arises on the validity of those pleas.

“ The fourth plea, which is pleaded only to ‘ the not shoring or propping up the walls, or taking other reasonable or proper precautions to support or secure the vault or cellar of the plaintiffs, so as to prevent the same from being weakened,’ we hold to be bad, on two grounds:—In the first place, the traverse contained in that plea is not the traverse of any allegation to be found in the first count of the declaration. The ground of action on which the plaintiffs rely in that count, is, their right to the foundations on which their vault rested; not any duty or obligation of the defendant to prop or shore up the plaintiffs’ vault, or to take due and proper precautions in pulling down his vault. When, therefore, the defendant traverses the existence of such duty or obligation, he traverses that which is not alleged by the plaintiffs; who only mention the

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want of propping and shoring up, and the want of proper precaution by the defendant, as the description of the mode or means by which the injury to them was occasioned. And the second objection to this plea appears to us to be this—that it raises an issue of law, and nothing else, for the consideration of the jury, viz. whether any duty or obligation was cast upon the defendant by law or otherwise. A jury might, indeed, try whether there was any duty of that nature arising from usage or contract; for, the existence of any such duty is a mere question of fact; but they cannot try whether there is any such duty or obligation cast upon him by law, for that is a question to be determined only by the court, and not by the jury.

“ On the same grounds, and for the same reasons, we hold the fifth plea to be bad in law.

“ As to the sixth plea of the defendant, it appears to us to be bad also upon two grounds:—First, it is a plea which confesses without avoiding that part of the charge in the first count to which it professes to be an answer. This plea is pleaded, not as any answer to the right claimed in the declaration, but to that which is alleged in the first count as a necessary and immediate consequence from the wrongful act of the defendant; that is, it is pleaded to part of the special damage alleged to have followed from the weakening of the plaintiffs' vault or cellar. But, if the vault or cellar of the plaintiffs has been weakened in its walls or foundations by

261] the wrongful act of the defendant, it is no avoidance of the plaintiffs' right of action, as it appears to us, that the timber, bricks, or materials that fell upon the vault or cellar in its weakened state, were not the property of the defendant, or were not thrown there by his careless-

ness or negligence; but that the defendant is equally liable to answer for the injury, in whomsoever the property of those materials may be, and whether they were placed there by the act of the defendant or of any other person. The plaintiffs have alleged in their declaration, that, but for the wrongful act of the defendant, and the weakened state of the walls, 'and no other account,' was the vault unable to bear or resist the weight and pressure of the timber, &c. The defendant, therefore, is the proximate cause of this damage, and appears to us to be answerable for it. And we think this plea is further bad, because it denies an obligation in law, and, still further, an obligation which has not even been alleged in the declaration.

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"The seventh plea is pleaded to the whole of the first count of the declaration. If, therefore, professing to give an answer to the whole, it omits any material part, it is bad. Now, the first count of the declaration is founded on the alleged wrongful act of the defendant, not only in pulling down the vaults and walls of the defendant, but also in digging the earth and disturbing the foundations of the vault or cellar of the plaintiffs; and to this cause of action, though confessed by the plea, there is no matter of avoidance pleaded in bar.

"The remaining pleas to which the plaintiffs have demurred apply themselves to the last count of the declaration. And of these we think the eighth plea cannot be supported, inasmuch as it traverses a matter of law. It is pleaded as to so much of the last count as relates to the defendant not having given to the plaintiffs due and reasonable notice of his intention to pull down his walls. The allegation in this plea, that he was not bound by law or otherwise, nor was there

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any duty, liability, or obligation imposed on him by law or otherwise, to give any notice of his intention to the plaintiffs, appears to us to raise a direct question of law upon an issue joined on that plea.

“The eleventh plea, which is pleaded to so much of the second count as alleges it to have been the duty of the defendant to have taken due and reasonable precautions about the pulling down his walls, we hold to be bad for the same reason as the last, viz. that it raises an issue of law instead of an issue of fact, for the jury.

“The twelfth plea falls altogether within the same consideration as the sixth, and is bad for the same reason.

“The last plea, to the second count of the declaration, is bad for the same reason as the seventh plea, which is pleaded to a similar part of the first count, and sets up precisely the same defence.

“But the defendant contends, that, admitting the pleas to be bad, the plaintiffs have shown no sufficient ground of action, either in the first or second count of their declaration.

[263] “The first count rests upon a precise and distinct allegation that the vault or cellar of the plaintiffs was of right supported by parts of the adjoining walls, and that the plaintiffs were of right entitled to have them so supported, and that there were certain foundations for supporting those vaults, which the plaintiffs ought to enjoy ; and the count then proceeds to allege, as part of the gravamen, that the defendant wrongfully dug the earth and disturbed the foundations, without taking due and proper precautions to prevent the foundations from being weakened. And we think, without entering into the examination of the several cases cited by the plain-

tiffs, this count contains a clear and substantive ground of action, viz., that of negligence and carelessness in the exercise of the defendant's rights, by means whereof the plaintiffs' rights were injured; and that if the defendant meant to object that the plaintiffs' right and title was not alleged with sufficient certainty, he ought to have demurred specially to the declaration, instead of pleading over.

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“With respect to the second count of the declaration, the right of action, as stated in that count, appears in one respect more doubtful. There is no allegation in this count of any right of easement *in alieno solo*, which forms the ground of the plaintiffs' action in the first count. And, as to the allegation, that it was the duty of the defendant to give notice to the plaintiffs of his intention to pull down his wall, if he did not shore it up himself, it is objected, and we think with considerable weight, that no such obligation results, as an inference of law, from the mere circumstance of the juxta-position of the walls of the defendant and the plaintiffs. But we think ourselves not called upon, on the present occasion, to decide this question; for the count goes on to allege that it was also the duty of the defendant to use due care and skill, and take due, reasonable and proper precautions, in pulling down his walls adjoining to the plaintiffs' vault: so that, for want of *such* care, skill and precaution, the plaintiffs' vault might not be injured; *and we think that duty is clearly imposed by law*; and that a breach which alleges that the defendant conducted himself so carelessly, negligently, and unskilfully, in pulling down his walls, as by reason thereof to injure the plaintiffs' wall, is well assigned; and that,

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“ Upon the whole, therefore, we think the plaintiffs are entitled to judgment on the demurrers filed to the several pleas of the defendant.”

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Trower.

Since the first edition of this work was published, the judgment of the Court of Common Pleas in the case of *Trower v. Chadwick* has been reversed in the Exchequer Chamber (*x*). That court was decidedly of opinion that a man was under no obligation towards his neighbour to use any care in dealing with his own property, where he had no notice of the existence on his neighbour's land of structures which might be injured by acts done on his own; and the court certainly did not say anything to indicate that any such obligation would exist by law if notice had been given. The judgment of the court (*y*) was delivered by *Parke*, B., as follows:—

“ We are unanimously of opinion that the judgment of the court below must be reversed. The question arises upon the second count of the declaration, which states that the plaintiffs were possessed of a certain vault and of certain wine therein, and that the defendant was about to pull down and did pull down and prostrate certain other vaults and walls next adjoining the vault of the plaintiffs: the count then goes on to state that thereupon it became and was the duty of the defendant, in the event of his not shoring up or protecting the plaintiffs' walls, to give due and reasonable notice to

(*x*) 6 Bing. N. C. 1; S. C. 8 *Williams*, J., *Gurney*, B., *Cole-*
Scott, 1. ridge, J. and *Maule*, B.

(*y*) *Parke*, B., *Patteson*, J.,

the plaintiffs of his, the defendant's, intention to pull down his vaults and walls, before the defendant prostrated and removed the same, so as to enable the plaintiffs to protect themselves. It then goes on to allege another duty in the defendant, viz. to use due care and skill, and take due, reasonable, and proper precautions in and about the pulling down and prostrating and removing the said vaults, &c., so adjoining the plaintiffs' vault, so that, for want of such care, skill and precaution, the plaintiffs' vault and its contents might not be damaged or destroyed or the plaintiffs be injured in respect thereof; and it then proceeds to allege as a breach that the defendant wrongfully and injuriously pulled down, prostrated and destroyed the vaults, &c., so adjoining the plaintiffs' vault, without giving them due or reasonable or other notice of his, the defendant's, intention so to do, according to his said duty in that behalf, although the defendant did not shore up or protect the plaintiffs' vault, and the defendant did not nor would use due care or skill, or take due, reasonable, or proper precautions in or about the pulling down or prostrating or removing the vaults, &c., so adjoining the plaintiffs' vault, upon that occasion, according to his said duty. And a general verdict has been found for the plaintiffs, with general damages.

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"The plaintiffs do not in this count allege any right to have their vault supported by the vaults or walls of the defendant; therefore no *right* of theirs has been injured by the act of the defendant. The duty to give notice is charged as one arising from the contiguity of the defendant's vault to that of the plaintiffs. No doubt can be entertained as to the opinion of the Court of Common Pleas upon this question. The Lord Chief

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Justice in delivering the judgment of the court, says, 'There is no allegation in this count of any right of easement *in alieno solo*, which forms the ground of the plaintiffs' action in the first count. And, as to the allegation that it was the duty of the defendant to give notice to the plaintiffs of his intention to pull down his wall, if he did not shore up himself, it is objected, *and we think with considerable weight*, that no such obligation results, as an inference of law, from the mere circumstance of the juxta-position of the walls of the defendant and the plaintiffs.' We also think it is impossible to say that under such circumstances the law imposes upon a party any duty to give his neighbour notice. We are inclined to think that the second count of the declaration has made the breach of this supposed duty a substantive ground for damage: and the probability is, that the main damage did result from the want of notice; for it is obvious, that if notice had been given, the plaintiffs might have taken precautions to strengthen their vault. Inasmuch, therefore, as the damages are given generally upon the whole declaration, we think the judgment must be arrested, and a *venire de novo* awarded.

"But, supposing that the improperly pulling down the defendant's vaults and walls may be treated as the substantive cause of action, and that the second branch of the argument that has been urged on the part of the plaintiffs is well founded (which we think it is not), then the question arises, whether any such duty as that which is alleged to have been violated is by law cast upon the defendant. The duty alleged to be cast upon the defendant by reason of the proximity of his premises to those of the plaintiff, is, 'to use due care and skill,

and to take due, reasonable and proper precautions in and about the pulling down and prostrating and removing the said vaults, buildings, and walls adjoining the plaintiffs' vault, so that for want of such care, skill and precaution, the vault of the plaintiffs, and the contents thereof, might not be damaged or destroyed on that occasion, or the plaintiffs injured in respect thereof; ' and the breach alleged is, ' that the defendant did not nor would use due care or skill, or take due, reasonable or proper precaution in or about the pulling down, prostrating or removing the said vaults, buildings or walls so adjoining the said vault of the plaintiffs, according to his duty.' The question is, whether the law imposes upon the defendant an obligation to take such care in pulling down his vaults and walls as that the adjoining vault shall not be injured. Supposing that to be so where the party is cognizant of the existence of the vault, we are all of opinion that no such obligation can arise where there is no averment that the defendant had notice of its existence; for one degree of care would be required where no vault exists, but the soil is left in its natural and solid state; another, where there is a vault; and another and still greater degree of care would be required where the adjoining vault is of a weak and fragile construction. How is the defendant to ascertain the precise degree of care and caution the law requires of him, if he has no notice of the existence or of the nature of the structure? We think no such obligation as that alleged exists in the absence of notice. And, therefore, upon this ground also we think the count is bad; and consequently there must be a *venire de novo*." *

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Trotter.

* *Fletcher v. Rylands*, 3 H. & C. 790, 795. By the Building Act

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The language of Lord *Tenterden* in *Walters v. Pfeil* evidently applies to the case of a usurpation having taken place, as otherwise there could be no necessity for shoring; the same observation applies to *Trower v. Chadwick*; while, from the variety of points which combined to form the judgment of the court in *Dodd v. Holme* (z), it can hardly be advanced as a decision upon this precise point.

Upon the amount of caution required in cases where no easement exists, depends the question, whether it is the duty of a party, intending to make alterations which may affect his neighbour's premises, to give notice of his intention (a). If the observations above made [by the author] are well founded, it [follows] that no such duty is imposed, [and the judgment in error, in *Trower v. Chadwick* (which was given after the publication of the first edition of this work), has decided] that there is no obligation to give such notice (b).

[265] The general rule of law upon this subject is thus laid down by Bracton:—

“Nocumentum enim poterit esse justum, et poterit esse injuriosum. Injuriosum ubi quis fecerit aliquid in suo injustè—contra legem vel contra constitutionem, prohibitus a jure. Si autem prohibere a jure non possit ne faciat, licet nocumentum faciat et damnosum,

[(z) See as to *Dodd v. Holme*,
Humphries v. Brogden, 12 Q. B.
719, and *Gayford v. Nicholls*, 9
Exch. 708, per Cur.]

(a) See *Massy v. Goyder*, 4
Car. & P. 161.

(b) *Chadwick v. Trower*, 6
Bing. N. C. 1; S. C. 8 Scott, 1.

no duty is imposed on a person pulling down an old party wall to board up or protect the neighbour's rooms while the wall is down. The inconvenience is one to which persons who live in houses, the walls of which are not reasonably safe, must be subject. (*Thompson v. Hill*, L. R., 5 C. P. 564.)

tamen non erit injuriosum, licitum est enim unicuique facere in suo quod damnum injuriosum non eveniet vicino" (c). Negligence in fact.

"An action does not lie for an act not prohibited by law; as if a lessee at will, by his negligence, burn his house, an action on the case does not lie (at the suit of the landlord), for the law does not punish him for permissive waste" (d); if, however, the fire be transmitted beyond the bounds of his property, and communicate to the adjoining house, he would have been liable at common law (e). Semblo. Not actionable where no case-ment exists. Countess of Shrewsbury's case.

[Here should be mentioned the important case of *Smith v. Kenrick* (f). In that case, a quantity of subterranean water had collected in the defendant's mine; below the water was a bar of coal, and this bar of coal prevented the water from entering the chambers of the mine. Adjacent was another mine belonging to the plaintiffs, and there were thyrlings or air-holes from the chambers of the one mine into those of the other. These air-holes or thyrlings had been made by a previous occupant of the defendant's mine (not privy to the defendant) through a seam (part of the plaintiffs' mine), which until then had formed a barrier between the mines. The defendant worked through the bar of coal and so let the subterranean water into the chambers of his mine, and the water flowing from thence through the thyrlings inundated the plaintiffs' mine. It did not appear that the defendant worked the bar in a negligent manner; his object was simply to get the coal; he knew that the result of excavating Smith v. Kenrick.

(c) Lib. 4, f. 221 n.

(d) *Countess of Shrewsbury's case*, 5 Rev. 13 b.

(e) *Turberville v. Stamp*, ante, p. 400.

[(f) 7 C. B. 515.]

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Smith v.
Kenrick.

the bar would be, unless artificial means were taken to prevent it, that the plaintiffs' mine would be flooded. Under these circumstances, it was held, that the defendant was not liable to the plaintiffs for the damage occasioned by the inundation; and the court laid down "that it is the natural right of each of the owners of two adjoining coal-mines,—neither subject to any servitude from the other,—to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be, that some prejudice will accrue to the owner of the other mine, *so long as that it does not arise from the negligent or malicious conduct of the party*" (g). This case has really no bearing upon the question above discussed, which assumes an undoubted right to do the act complained of, whereas in *Smith v. Kenrick* the question was, whether there was a right to let the water into the plaintiffs' land. Further, the question above discussed only arises in the case of an act being done by a man on his land, the positive consequences of which do not extend beyond the boundaries of his own land; whereas in *Smith v. Kenrick*, the positive consequences of the act did so extend. Generally, it is a violation of the common right of a landowner, if any act be done on other land, the consequence of which is the introduction of any substance on to his land; thus if in *Smith v. Kenrick*, the water had been on the surface and confined by a dam, and the defendant by cutting through the dam had let loose the water on to the

[(g) This proposition appears to be too general, as it excludes an action for the infringement of the natural right of support (see

ante, p. 358) in the case of a subsidence caused in a mine by the working of another mine underneath, however carefully.]

surface of the plaintiffs' land, he would clearly have been liable even though there had been on the plaintiffs' land a natural barrier to the water, and the plaintiffs had removed this barrier before the water was let loose. The exemption of the defendant from liability in such cases as *Smith v. Kenrick* is of an exceptional character, depending on the peculiar doctrine relating to subterranean water; the which, as it may be intercepted or withdrawn (see ante, p. 287), so it may be let loose into the substrata of adjacent land; and the owner of the adjacent land, if desirous of preventing its influx on to his land, must defend himself against it as against a common enemy; at all events, in cases of contiguous mines, where the water is set at liberty in the ordinary course of working the mine, from which it escapes. The qualification in the passage above cited from *Smith v. Kenrick*, namely, that the party letting loose the water may be liable if the damage arises from his negligence or malice, seems to have been introduced on the reasoning that the peculiar exemption from liability in such cases is made in favour of mining, and therefore does not extend to acts not done in the ordinary and proper course of mining.]*

Negligence in fact.

* Water not only confers rights, but imposes obligations. It is sometimes beneficial, sometimes mischievous. "Without any convention, the occupier of a lower field holds it under the servitude of receiving the natural drainage from an adjoining field on a higher level." (Per Lord Campbell, *Scots Mines Company v. Lead Hills Mines Company*, 34 L. T. 31; per Cur., *Smith v. Kenrick*, 7 C. B. 566.)

"The old course of a flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course by a new sort of water-way, to the prejudice of the proprietors on the

Menzies v. Earl of Breadalbane.

Negligence in fact.

Subject to the restriction already mentioned, that an encroachment must not be removed with unnecessary

Mischief by water.

other side. It is also clear that an inferior heritor cannot do that which will cause the water to stagnate to the prejudice of the superior. This applies not only to the ordinary course of the river, but also to a flood channel. I am not talking of that which it takes in extraordinary and accidental floods, but the ordinary course of the river in the different seasons are subject to the same principle." (*Menzies v. Earl of Breadalbane*, 3 Bligh, N. S. 418.) A mound may be erected to prevent the course of the river from being altered. (*Farquharson v. Farquharson*, cited 3 Bligh, N. S. 421.)

Rex v. Trafford.

And in *Rex v. Trafford* (1 B. & Ad. 887), the court say:—"It has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another;" and they held that no sound distinction could be made between the ordinary course of water flowing in a bounded channel at all usual seasons and the extraordinary course which its superabundant quantity had been accustomed to take at particular seasons. The Exchequer Chamber agreed in the principle so laid down, and held, in addition, that the landholders had a right to raise the banks of a river from time to time, as it became necessary, upon their own lands, so as to confine the flood water within the banks, and prevent it from overflowing their own lands, with this single restriction, that they did not thereby occasion any injury to the lands or property of other persons. (*Trafford v. The King*, 8 Bing. 210, 211.)

Nield v. London and North Western Railway Company.

There is no analogy in this respect between a canal and a river; a canal is not a natural outlet for water, and the adjacent landowners have no right to its use as such. When, therefore, an overflow of flood water comes into a canal, the owners of the canal are entitled to protect themselves by a fence, though they thereby cause the flood to injure their neighbours' land. (*Nield v. London and North Western Railway Company*, L. R., 10 Exch. 4.)

Rex v. Pugham Commissioners of Sewers.

A landowner exposed to the inroads of the sea may endeavour to protect himself by erecting a groyne or other reasonable means of defence, though it may cause the sea to flow with greater violence against the land of his neighbour, and make it necessary for him to do the like, the sea being a common enemy against which each is entitled to protect himself. (*Rex v. Pugham Commissioners*, 8 B. & C. 360.)

Underground water coming into a mine is also a common enemy against which each man must defend himself. The person in whose mine it collects is not bound to prevent it flowing into his neighbour's, as appears by the above-cited case of *Smith v. Kenrick*.

violence, there seems nothing to take this class of cases out of the rule before adverted to—"That a party con-

Negligence in fact.

In *Firmstone v. Wheeley* (2 D. & L. 203), the plaintiffs and defendants were owners of adjoining mines. The defendants had trespassed on the plaintiffs' mine and removed a quantity of coal. Water had arisen in the defendants' mine, against which, but for the defendants' trespass, the coal would have been a barrier, and therefore, as the plaintiffs declared, it had become the duty of the defendants to prevent the water in their mine from flowing into the plaintiffs'. The defendants neglected to do so, and the plaintiffs' mine was inundated. The Court of Exchequer held the declaration good on demurrer. *Pollock*, C. B., said—"There may, perhaps, be a difference as regards the law between a barrier in a mine and a fence above ground. If a wall is knocked down, the owner may maintain an action for the trespass; but he cannot, by omitting to rebuild it, hold the defendant always responsible for any consequential damage. Here the plaintiffs say that the removal of the barrier is irreparable, and therefore the duty alleged in this declaration may well arise."

Mischief by water.

Firmstone v. Wheeley.

In *Clegg v. Dearden* (12 Q. B. 576), the facts were similar, and the plaintiff, after recovery in an action of trespass for removing the barrier of coal in his mine, sued the defendant for omitting to close the aperture, whereby the plaintiff's mine was inundated by water from the defendant's. The court gave judgment against the plaintiff, saying—"The defendant, having made an excavation and aperture in the plaintiff's land, was liable to an action of trespass; but no cause of action arises from his omitting to enter the plaintiff's land and fill up the excavation. Such an omission is neither a continuation of a trespass nor of a nuisance, nor is it the breach of any legal duty." As to *Firmstone v. Wheeley*, they said—"The court did not there determine that there was any duty or obligation on the defendants to prevent the water flowing from their mine through the aperture made by them into the plaintiffs'; and if they had, the case would not be an authority applicable to the present, as the plaintiff has not alleged any such duty or obligation in his declaration, nor is his action founded on a breach of any such duty, but on the omission to fill up the aperture made by him in the plaintiff's mine."

Clegg v. Dearden.

These cases were before *Smith v. Kenrick*. The court there say (7 C. B. 564) that *Firmstone v. Wheeley* is hardly to be treated as a decision; and though they do not cite *Clegg v. Dearden*, they say, after an action of trespass for removing the barrier, no second action could be maintained for the consequential damage. *Smith v. Kenrick* was cited with approbation and followed by the House of Lords in *Scots Mines*

Negligence in
fact. fining himself within the limits of his own property
may deal with it as he will" (*h*). If he dig a pit, he

[*(h)* This view is supported by *Guyford*, App., *Nicholls*, Resp., 9 Exch. 702, in which, the plaint being in part for negligently taking away the support of a modern house, the judge was held to have misdirected the jury in leaving to them the question of negligence. In several modern text books, not including Wins. Saund. (see vol. 2, 400, n. (*a*), of that invaluable work, 2 Notes to Saund. 802), it is laid down, without further authority than the cases above distinguished by the learned editors, that an action is maintainable against a landowner for negligence in removing the support afforded by his land to the modern house of his neighbour. This may to some extent be attributable to vagueness in the use of the relative term negligence (per *Erle*, C. J., 29 L. J., C. P. 319; *Bramwell*, B., 1 H. & N. 251; 3 H. & N. 318;

Watson, B., 28 L. J., Exch. 250), of which a definition is given by *Alderson*, B., in *Blyth v. Birmingham Waterworks Company*, 11 Exch. 784; and *Willes*, J., *Vaughan v. Taff Vale Railway Company*, 5 H. & N. 687, 688. It should seem that, in this class of cases, if the mere removal occasions the fall, the defendant is not liable, however negligent may have been the manner of the removal,—for his act was confined to his own land; but if it was not merely the removal or omission to do things to prevent its effect, but the *manner* of the removal, which caused the fall, then he is liable,—for then of necessity his act must have extended beyond his own land, and the force proceeding from it must have entered the plaintiff's land, and actively created there the motion which produced the fall.]

Mischief by
water.

*Bagnall v.
London and
North West-
ern Railway
Company.*

Company v. Lead Hills Mines Company (34 L. T. 34). See also *Jegon v. Vivian* (L. R., 6 Ch. 758).

In *Bagnall v. London and North Western Railway Company* (7 H. & N. 423; 1 H. & C. 544), by the conjoint effect of the making of the defendants' railway cutting and of their neglect to keep their drains in proper order, the plaintiff's mine was inundated by water, which would not otherwise have come to it. The mine was not worked until after the making of the railway and drains. It was held that the company were liable. The case was decided partly on the effect of the railway acts, but one of the grounds of the judgment of the Court of Exchequer was that by the acts of the defendants they had diverted the surface water and caused it to flood the plaintiff's mine. (See also *Cracknell v. Thetford*, L. R., 4 C. P. 636.)

*Baird v. Wil-
liamson.*

In *Baird v. Williamson* (15 C. B., N. S. 376), the defendant, the

is not bound to put a fence round it, to keep trespassers from falling into it (*i*). Negligence in fact.

(*i*) 1 Roll. Abr. 88, pl. 4; fully supported in *Jordin v. Crump*, 8 M. & W. 788;* [but qualified by *Barnes v. Ward*, 9 C. B. 392, to the extent that if the pit abuts on a highway and renders the highway dangerous to persons passing along it with ordinary care, then the occupier is bound to fence it. This is on the ground that such pit is a public nuisance, interfering with the use of the way. But if the pit or other excavation be not substantially adjacent to the way, there is no obligation to fence it, and no action is maintainable against the owner of the land, if a person accidentally or otherwise straying off the way falls into the pit. *Harcastle v. South Yorkshire Railway, &c. Company*, 4 H. & N. 67; *Hounsell v. Smyth*, 7 C. B., N. S. 731; S. C. 29 L. J., C. P. 203. As to the responsibility of an occupier of premises for injuries occasioned by the defective state of the premises to persons there with his leave, for

instance—to a private visitor, see *Southcote v. Stanley*, 1 H. & N. 247; *Corby v. Hill*, 4 C. B., N. S. 556;—to a visitor at a place of public entertainment, see *Pike v. Polytechnic Institution*, 1 F. & F. 712;—to a customer, *Chapman v. Rothwell*, E. B. & E. 168; *Lancaster Canal Company v. Parnaby*, 11 A. & E. 243, per Cur.;—to a servant, *Seymour v. Maddox*, 16 Q. B. 326; *Senior v. Ward*, 1 Ell. & Ell. 385; *Holmes v. Clark*, 6 H. & N. 319; 7 ib. 937, and the cases there cited;—to a passenger at a railway station, see *Toomey v. London, Brighton, &c. Railway Company*, 3 C. B., N. S. 146; *Martin v. Great Northern Railway Company*, 16 C. B. 179;—to persons suffered to use dangerously defective machinery erected on the premises, *Blakemore v. Bristol and Exeter Railway Company*, 8 F. & B. 1035; see *McCarthy v. Young*, 6 H. & N. 329.]

* *Stone v. Jackson*, 16 C. B. 199.

owner of a mine on a higher level, was held liable for flooding the plaintiff's mine on a lower level with water brought by the defendant into his mine. He was not liable for the escape of water coming into his mine from natural causes, on the authority of *Smith v. Kenrick*, but was bound to prevent the escape of water brought there by himself.

In *Hodgkinson v. Ennor* (4 B. & S. 229), the defendant was held liable for permitting the refuse from his manufactory to communicate with a mill stream of the plaintiff, by a roundabout course through drains and swallets, and thereby fouling the water to his injury. *Blackburn, J.*, says if filth is created on any man's land, then, in the quaint

Mischief by water.

Hodgkinson v. Ennor.

*Harris v.
Ryding.*

In the recent case of *Harris v. Ryding* (*h*) there had been a reservation of the minerals under the land, and

(*h*) 5 M. & W. 60. [See *Humphries v. Brogden*, 12 Q. B. 739, 751.]

Mischief by
water.

*Harrison v.
Great
Northern
Railway
Company.*

language of the report in Salk. 361, "he whose dirt it is must keep it that it may not trespass."

In *Harrison v. Great Northern Railway Company* (3 H. & C. 231), the defendants were the transferees from the proprietors of a navigation of a delph, the banks of which they were, by act of parliament, bound to maintain. The outlet of the delph was in a channel, the commissioners for the management of which were bound to keep it of certain dimensions, which they failed in, and by reason thereof the water in the delph was penned back. It consequently rose in the delph, and owing to its rising and the defective construction of the banks, one of them gave way, and the plaintiff's land was inundated. It was argued for the plaintiff that the defendants were insurers; that as they for their purposes brought the water there they were bound to restrain it. The court held that it was not necessary to decide this, as the defendants were liable on other grounds. They were bound to maintain a sufficient cut or delph. The sufficiency of the cut depended on its depth, width, fall and outlet, as compared with the water likely to be in it. The cut was not sufficient to hold the water likely to be in it, owing to the condition of its outlet. If no one was under any obligation in relation to the outlet, it was clear that the cut was insufficient, and the defendants would be responsible. Were they less so because there was an obligation as to the outlet which was not performed? The court held not. It was not the case of a sudden wrong done by others in stopping up the outlet; it was a permanent long-continued state of things, which it was the duty of the defendants to obviate or guard against. See also *Reg. v. Lord Delamere* (12 W. R. 707; 13 W. R. 757), and *Lord Delamere v. Reg.* (L. R., 2 H. Lds. 417).

*Fletcher v.
Rylands.*

In *Fletcher v. Rylands* (3 H. & C. 774; L. R., 1 Ex. 265; 3 H. Lds. 330), the defendant made a reservoir in his land, the water from which, owing to a defect in the subsoil, flowed into and flooded the plaintiff's mine, of which the defendant, when his reservoir was made, had no knowledge. The Court of Exchequer held that the defendant was not liable. The judgment was reversed by the Exchequer Chamber, *Blackburn, J.*, saying, "We think the true rule of law is, that a person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so is *primâ facie* answerable for all damage which is the natural consequence of its escape. He can excuse himself

the defendant removed them in such a negligent manner that the surface of the earth fell in. In this case it is

Harris v. Ryding.

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Mischief by water.

by showing that the escape was owing to the plaintiffs' default, or perhaps that the escape was the consequence of *vis major*, or act of God." This was adopted by the Lord Chancellor (Lord *Cairns*) in the House of Lords (L. R., 3 H. Lds. 339), where the decision was affirmed.

In *Smith v. Fletcher* (L. R., 7 Exch. 305; 9 Exch. 64), the defendants, in working their mines, had caused water to collect in their land to a greater extent than would have been the case had the surface been in its normal and unbroken condition, from which it flowed into the plaintiff's mine and did him injury. The judge ruled that they were absolutely liable for the consequences, and rejected evidence of the precautions they had taken to guard against ordinary emergencies. The Court of Exchequer upheld his ruling, on the authority of *Fletcher v. Rylands*, the defendant having diverted the surface water and caused it to flow into his mine, and thence into the defendant's, for his own purposes. The decision was reversed in the Exchequer Chamber, who thought that the case was not in every respect within the authority of *Fletcher v. Rylands*, and that if evidence had been given on behalf of the defendants, there might have been questions for the consideration of the jury, and that a distinction ought to have been drawn between the water which came from the diversion and that which came from the natural overflow, and that the opinion of the jury ought to have been taken as to whether what was done by the defendants was done in the ordinary, reasonable and proper mode of working the mine.

Smith v. Fletcher.

In *Crompton v. Lea* (L. R., 19 Eq. 115), the defendants were about to work a mine under a river, the effect of which would be to tap the river, and that which then existed as a flowing stream would be immediately precipitated into the mine of the defendants, and thence into the mine of the plaintiff. *Hall, V.-C.*, overruled a demurrer to a bill for an injunction, saying that, instead of this being an ordinary, reasonable and proper mode of working the seams of coal, it appeared to him to be just the reverse.

Crompton v. Lea.

In the case of persons occupying the upper and lower floors of a house, the occupier of the upper floor is not absolutely bound to prevent water coming, or being there in the ordinary course, from flowing into the lower. In *Carstairs v. Taylor* (L. R., 6 Exch. 217), the plaintiff hired of the defendant a ground floor warehouse, the upper part being occupied by the defendant. The water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains; a hole was made in the box by a rat, through which the water entered the warehouse and wetted the plaintiff's goods. It was held that the defendant was not liable. *Martin, B.*, said, "Probably the defendant was bound to use reasonable care in keeping the roof, but

Carstairs v. Taylor.

*Harris v.
Hyding.*

obvious, and it appears to have been so admitted, that there existed the natural right of support for the upper

Mischief by
water.

cannot be held responsible for what no reasonable care or vigilance could have provided against."

*Ross v.
Fedden.*

A similar decision was arrived at where the escape of water was from a watercloset on the upper floor, there being no evidence of negligence on the part of the occupier of the upper floor. One who takes the floor of a house must be held to take the premises as they are. As far as he is concerned, the state of things then existing may be treated as the natural state of things, and the flow of water through cisterns and pipes then in operation is equivalent to the natural flow of water. (*Ross v. Fedden*, L. R., 7 Q. B. 661.)

*Nichols v.
Marstrand.*

The defendant stored water on his land adjoining the plaintiff's. An extraordinary downfall of rain caused the water to burst the banks and flood the plaintiff's land. The court held the defendant not liable, on the ground that the defendant had taken all reasonable care to confine the water, and the banks were sufficient for all purposes to be anticipated, and the flood was caused by the *vis major*. They were by no means sure that the likeness of a wild animal was exact. (*Nichols v. Marstrand*, L. R., 10 Exch. 255.)

*Wilson v.
Newberry.*

In *Wilson v. Newberry* (L. R., 7 Q. B. 31), it was attempted to apply the decision in *Hylands v. Fletcher* to a very different case. The defendant was charged with having poisonous yew-trees on his land, and taking such little care of them that the clippings were placed on the land of the plaintiff, and poisoned his horses. He was held not liable, *Mellor, J.*, saying, "If a person brings on his land things which have a tendency to escape and do mischief, he must take care that they do not get on to his neighbour's land. This is very different from the proposition contended for, that where a person has yew-trees growing on his land, which are clipped by some means, he must prevent the clippings from escaping to his neighbour's land, and being placed there by a stranger."

Diversion of
water for
public pur-
poses.

Where water is diverted or regulated for public purposes under act of parliament, as by conservators of a river, a waterworks or canal company, the authorities managing the water are not liable to an action for its escape, though caused by them, unless they exceed their powers, or are negligent in the execution of them, though the party injured may be entitled to compensation, if the act so provides.

*Cracknell v.
Thetford.*

The corporation of Thetford were empowered by act of parliament to make navigable the river Brandon. In the exercise of their powers they erected staunches in the river, the effect of which, combined with the natural growth of weeds and the accumulation of silt, was to cause the river to overflow its banks. The court held that they were not

soil from the soil beneath; and therefore the entire removal of the inferior strata, however done, would be actionable, if productive of damage, by withdrawing that degree of support to which the owner of the surface was entitled. It was a clear violation of the duty of the subjacent owner to do no act whereby the enjoyment of the surface could be interfered with (1).

Harris v. Ryding.

The seeming exception to this rule, arising from the prohibition to use dangerous instruments or animals for the protection of premises, without notice, depends upon the principle, that a man shall not do that indirectly which he cannot do directly; and as such means of offence would be calculated to do more injury than he

Dangerous animals.

[(1) See the account of this case given by the court in *Humphries v. Brogden*, 12 Q. B. 739.]

liable to an action at the suit of a proprietor whose lands were flooded, because they had power to erect the sluices, and were not bound to cut the weeds or remove the silt, except for the purposes of navigation. (*Cracknell v. Mayor and Corporation of Thetford*, L. R., 4 C. P. 629.)

Diversion of water for public purposes.

A waterworks company were sued for damage sustained through the bursting of their pipes after a frost of extraordinary severity. The court set aside a verdict for the plaintiff on the ground that there was no evidence of negligence. *Alderson*, B., defined negligence as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. (*Blyth v. Birmingham Waterworks Company*, 11 Exch. 781.)

Blyth v. Birmingham Waterworks Company.

A canal company made their canal over the plaintiff's minerals, which they refused to purchase. He worked his mines as the act of parliament allowed him, and in so doing caused the canal waters to flow into and drown his mine. It was held that the company were not liable to an action. The canal was lawfully made and lawfully kept, and the plaintiff worked his mine at his own risk. Some of the judges thought that he was entitled to compensation on the construction of the act of parliament. (*Dunn v. Birmingham Canal Company*, L. R., 7 Q. B. 244; 8 Q. B. 42.)

Dunn v. Birmingham Canal Company.

Dangerous animals.

would be justified in using to defend his possession against trespassers, he shall not be allowed to do so unless he gives such notice as makes the party fully aware of the danger he is rushing upon, and the damage sustained by him clearly the consequence of his own act (*m*).

Public officers.

The cases in which parties acting in a public capacity, and under the limited authority conferred by their office, have been held liable for the injurious consequences of their want of care, do not afford any authority upon this subject (*n*)—whether they are liable for not taking

[267] due and proper precautions in doing the acts they are authorized to do: or liable only if they have not acted to the best of their skill and judgment: the principles already adverted to do not appear to apply to them.

• *Jones v. Bird.*

In the case of *Jones v. Bird* (*o*), an action was brought against the Commissioners of Sewers for negligently

(*m*) [See the judgments in *Deane v. Clayton*, 7 Taunt. 489; *Holt v. Wilkes*, 3 B. & A. 301; *Bird v. Holbrook*, 4 Bing. 635; and] post, Ch. VII.

[(*n*) See *Stainton v. Woolrych*, 23 Beav. 225; S. C. 26 L. J., Chan. 300.]

(*o*) 5 B. & A. 837. [This and the two next cases mentioned in the text will suffice to illustrate the distinction pointed out by the learned author. For more recent authorities upon the subject, see *Whitehouse v. Fellowes*, 10 C. B., N. S. 765; *Ruck v. Williams*, 3 H. & N. 308, and the cases there cited; *Southampton and Itchin Bridge Company v. Local Board*

of Southampton, 8 E. & B. 801; *Gibbs v. Trustees of Liverpool Docks* (Cam. Scac.), 3 H. & N. 161; *Metcalf v. Hetherington* (Cam. Scac.), 5 H. & N. 719; *Piggot v. Eastern Counties Railway Company* 3 C. B. 229; *Vaughan v. Taff Vale Railway Company* (Cam. Scac.), 5 H. & N. 679; *Mersey Docks, &c. Board v. Penhallow* (Cam. Scac.), 7 H. & N. 329; *Cowley v. Mayor, &c. of Sunderland*, 6 H. & N. 565; *Whitehouse v. Birmingham, &c. Canal Company*, 27 L. J., Exch. 25; *Manley v. The St. Helens Canal, &c. Company*, 2 H. & N. 840.]

making sewers near the plaintiff's houses, whereby the foundations thereof were weakened, and the walls fell down. It appeared that the sewer, which it was necessary to repair, ran immediately adjoining the plaintiff's houses, with a stack of chimneys belonging to one of the houses resting upon the arch of it. Being necessary to re-build this arch, the defendants, to support the chimneys, placed under them a transum and two upright posts: the chimneys fell, and, in consequence of their fall, the houses fell also. Contradictory evidence was given as to whether proper care was taken in supplying the place of the arch. It further appeared, that there was no specific notice given to the owner of the house to which the chimneys belonged, of the danger in which they would be placed. But a general notice was given to the inhabitants of the houses, that the sewer was repairing; the jury having found a verdict for the plaintiff, under the direction of the Chief Justice, a rule was obtained for a new trial, which was afterwards discharged, the court holding, "That the Commissioners of Sewers and agents, when repairing sewers in the neighbourhood of houses, were bound to take all proper precaution for their security; and that one question for the jury to consider was, whether shoring up was a proper precaution, and whether it had been omitted. I also told them," continued *Abbott*, C. J., "that, even if they were of opinion that the stack of chimneys could not, by any shoring up whatsoever, have been prevented from falling, still it was the duty of the defendants, if they thought so, to give specific notice of the danger to the owner; and that, if they did not do so, they were responsible." "As to the merits of the case," said *Bayley*, J., "it is contended, that the defendants are

Negligence in
exercise of a
limited right,

Jones v. Bird.

Negligence in
exercise of a
limited right.

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protected, if they acted *bonâ fide*, and to the best of their skill and judgment. But that is not enough; they are bound to conduct themselves in a skilful manner, and the question was most properly left to the jury to say, whether the defendants had done all that any skilful person could reasonably be required to do in such a case.”*

*Rees v. Pagham
Commissioners.*

In the case of *The King v. Commissioners of Sewers for the Levels of Pagham* (p), it was held, that where commissioners of sewers acting *bonâ fide* for the benefit of the levels for which they were appointed, directed certain defences against the inroads of the sea, which caused it to flow with greater violence against and injure the adjoining land not within the levels, they could not be compelled to make compensation to the owner of it, or to erect new works for his protection. “I am of opinion,” said Lord *Tenterden*, “that the only safe rule to lay down is this, that each land-owner for himself, or the commissioners acting for several land-owners, may erect such defences for the land under their care, as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy” (q).

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“It seems to me,” said *Bayley*, J., “that every landholder exposed to the inroads of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose; and the commissioners may erect such defences as are necessary

(p) 8 B. & C. 355; [S. C. 2 N. & Man. 468; cited 1 Smith, L. C. 5th ed. 248.] [(q) See *Smith v. Kenrich*, 7 C. B. 515, ante, p. 441.]

* *Drew v. New River Company*, 6 Car. & Payne, 754.

for the land intrusted to their superintendence. If, indeed, they made unnecessary or improper works, not with a view to the protection of the level, but with a malevolent intention to injure the owner of other lands, they would be amenable to punishment by criminal information, or indictment, for an abuse of the powers vested in them. But if they act *bonâ fide*, doing no more than they honestly think necessary for the protection of the level, their acts are justifiable, and those who sustain damage therefrom must protect themselves. If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title, these two things must concur—damage to himself, and a wrong committed by the other. That he has sustained damage is not of itself sufficient. Here the party may have sustained damage, but the commissioners have done no wrong. The right which each land-owner has, is to protect himself, not to be protected by his neighbours. To that right no injury has been done, nor can any wrongful act be charged against the commissioners.”

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Rea v. Pagham Commissioners.

The civil law recognized the same distinction between acts of self-defence and ordinary acts in the use of property (*r*).

Civil Law.

In this case it was in fact held, that the commissioners had, with respect to making defences against

(*r*) Idem Labeo ait, si vicinus flumen (aut) torrentem averterit, ne aqua ad eum perveniat, et hoc modo sit effectum ut vicino nocentur, agi cum eo aquæ pluvie arcendæ, non posse, aquam enim arcere, hoc est, curare ne influat; quæ sententia verior est, si modo non hoc animo fecit ut tibi noccat,

sed ne sibi noccat.—L. 2, § 9, ff. De aq. et aq. pl. arc.

Aggeres juxta flumina in privato facti, in arbitrium aquæ pluvie arcendæ veniunt, etiamsi trans flumen noceant; ita si memoria eorum extet, et si fieri non debuerunt.—L. 23, § 2, ff. ibid.

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the sea, the same right as the owner of the land; and that as every owner has, as incident to the property, the right of doing whatever may be requisite for its protection from the incursions of the sea, they were not liable for the injury resulting from the erection of such defensive works.

In the recent case of *The Grocers' Company v. Donne(s)*, the same principles were recognized.

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Company v.
Donne.*

Tindal, C. J., in delivering the judgment of the court of C. P., said,—“ But the question is, whether the facts found upon this award bring the case within the terms of the declaration. The cause having been referred, and the arbitrator having stated the facts for the opinion of the court, we must see whether or not the facts so found raise the duty set up by the plaintiffs in their declaration. The declaration states that the commissioners wrongfully and injuriously did make, cut and dig a certain shaft, sewer, gutter and ditch, near unto an ancient messuage and premises in possession of the plaintiffs, and did unskilfully, wrongfully and improperly make, cut and dig the said shaft, sewer, gutter and ditch, so being near unto the said ancient messuage and premises of the plaintiffs as aforesaid, and did also make, cut and dig the said shaft, gutter, sewer and ditch, without shoring up, propping or duly securing the said messuage and premises, or the earth and sub-soil supporting the walls of the said ancient messuage and premises of the plaintiffs as aforesaid, in order to prevent the same from being injured by the said making, cutting and digging of the said shaft, sewer, gutter and ditch as aforesaid. As to the want of notice, the arbi-

(s) 3 Bing. N. C. 34; 3 Scott, *Stainton v. Woolrych*, 23 Beav. 856, and cases there cited; [and 225; S. C. 26 L. J., Chanc. 800.]

trator has raised no question. We must then look at the award, and see whether or not the commissioners have conducted themselves in an unskilful, wrongful and improper manner in the construction of the sewer in question. The allegation of unskilfulness is negatived by the award, for it expressly finds that the work was done in a skilful and proper manner. But the question is, whether the commissioners are to be mulcted in damages by reason of their having proceeded by a process called tunnelling, in preference to open cutting. If the award had found, that, in the judgment of experienced men, no injury would have resulted to the plaintiffs, had the commissioners proceeded by open cutting, the plaintiffs would have been entitled to a verdict. But the arbitrator finds that there was risk in either way, though less from open work than from the other mode: and if the commissioners were bound to pursue that mode which gave the greatest possible chance of escape from injury, the verdict ought to be entered for the plaintiffs. But how are we to say that the commissioners are to be liable in damages, not because they did not perform the work in a skilful, proper and workmanlike manner, but because they did not adopt that course which afforded the utmost possible chance of averting danger? The court is not to balance possibilities. We are called upon to pronounce a judgment against the commissioners, because, had another mode of operation been resorted to, by some remote possibility the damage of which the plaintiffs complain *might* not have accrued. It seems to me that the plaintiffs can only entitle themselves to a verdict by showing that the injury would not have happened if the sewer had been constructed by open cutting:

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Negligence in exercise of a limited right. and consequently the verdict must be entered for the defendant."*

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Legalized nuisance.

* The rule established in *Rees v. Pease* (4 B. & Ad. 30), and *Vaughan v. Taff Vale Railway Company* (5 H. & N. 679), is, that when the legislature has sanctioned the use of a locomotive engine, or other act which at common law would be a nuisance, there is no liability for any injury caused by using it, so long as every precaution is taken consistent with its use. (*Hammersmith Railway Company v. Brand*, L. R., 4 H. Lds. 201.) The powers must be exercised with due and reasonable care and diligence. (*Jolliffe v. Wallasey Local Board*, L. R., 9 C. P. 79.) With a reasonable regard to the rights of others, and not in a vexatious or careless way. (*Biscoe v. Great Eastern Railway Company*, L. R., 16 Eq. 640.)

Railway crossing.

A railway crossing a highway on the level is within this rule. In this case the company are bound, in addition to putting up the gates, &c. required by statute, to take reasonable precautions to prevent accidents to the public using the highway. Thus, where a railway crossed a footway and an accommodation carriage road at a sharp curve, and a large number of trains passed daily, and the view was obstructed by a bridge, and there was no caution board and no person in charge of the gate, and the plaintiff while using the footpath was knocked down by an engine, *Erle, C. J.*, left it to the jury whether or not the company had been guilty of negligence, and they having found for the plaintiff, the court upheld their finding. (*Bilbee v. London, Brighton and South Coast Railway Company*, 18 C. B., N. S. 584.) And where the plaintiff was knocked down by an engine of the defendants while crossing the line by a footpath, the morning being dark and foggy and the railway obscured by smoke, and he looked up and down before crossing, the defendants were held liable, because the engine had no light and did not whistle. The court held that the defendants were bound to use reasonable precautions in working their line. (*James v. Great Western Railway Company*, L. R., 2 C. P. 634, n.) These cases were decided on the ground that the company are bound to take additional precautions where there are special dangers in working the line, beyond those contemplated by parliament, as where such circumstances prevent a person from avoiding an approaching train by the exercise of due care. (Per *Smith, J.*, *Skelton v. London and North Western Railway Company*, L. R., 2 C. P., 637.)

In *Cliff v. Midland Railway Company* (L. R., 5 Q. B. 258), *Mellor, J.*, says, "That the company are bound, in crossing a footway on the level, as to the mode of working their railway, as to the rate of speed, and signalling, or whistling, or other ordinary precautions, to use everything that is reasonably necessary to secure the safety of

Where, however, from the situation of the premises, the acts of the party, though done entirely on his own

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persons who have to cross the railway by the means of the footway." It was there held that they were not bound to have a gatekeeper, nor chargeable with negligence because they had omitted to avail themselves of an act of parliament which enabled them to do away with the level crossing. With respect to the structure of the highway they cross, they are bound to lay and keep their rails so as to do as little injury as possible. (*Oliver v. North Eastern Railway Company*, L. R., 9 Q. B. 409.)

Where the railway was so made that a person crossing it could see an approaching train in time to avoid it, the court held that there was no reasonable evidence of negligence to go to a jury. (*Stubley v. London and North Western Railway Company*, L. R., 1 Ex. 13; *Skelton v. London and North Western Railway Company*, L. R., 2 C. P. 631; *Ellis v. Great Western Railway Company*, L. R., 9 C. P. 551.) Where the company's servant left a carriage gate open contrary to the statute and the company's rules, and so invited the deceased to cross the line, they were held liable. (*Stapley v. London, Brighton and South Coast Railway Company*, L. R., 1 Ex. 21; *Wanless v. North Eastern Railway Company*, L. R., 6 Q. B. 481; 7 H. Lds. 12.) So where the company's servant in charge of the gates across a public road told a person using a private way that he might safely cross the line, the decision was the same. (*Lunt v. London and North Western Railway Company*, L. R., 1 Q. B. 277.) Where from their neglect to have a gate or stile at a footway a child strayed on the railway and was injured, the company was held liable, as had a stile been there he might not have got on the line. (*Williams v. Great Western Railway Company*, L. R., 9 Ex. 157.) Where the plaintiff using a carriage-road, finding no one in charge of the gates, opened them himself and was injured, the company were held not liable, on the ground that he had no right to open the gates, and the accident was therefore not the necessary effect of the company's neglect. (*Wyatt v. Great Western Railway Company*, 6 B. & S. 709.)

Where a public body is authorized by parliament to construct public works, such as works for the benefit of commerce (*Mersey Dock Trustees v. Gibbs*, L. R., 1 H. Lds. 93; 11 H. Lds. 686), or a sluice for the drainage of a district (*Coe v. Wise*, L. R., 1 Q. B. 711; *Collins v. Middle Level Commissioners*, L. R., 4 C. P. 279), though all their funds are devoted for public purposes they are responsible for negligence to the same extent as an individual. On this principle the Conservators of the Thames were held liable for the defective state of a towing-path, for the use of which they took tolls, though it was over the natural soil. If they announce to those who pay the tolls that they must take

Liability of body acting for public.

Negligence in exercise of a limited right. property, may be productive of injury to the public (*t*), he is bound to exercise such a degree of care and caution as shall prevent damage to persons exercising, on their part also, reasonable care to avoid the danger (*u*).

[(*t*) It will be seen that in *Hardcastle v. South Yorkshire Railway, &c. Company*, post, p. 467, the question for the jury was held not to be whether the act was productive of danger to the public.]

[(*u*) In the case of a dangerous public nuisance, as an obstruction to a way such as renders it impassable with safety, a person who incurs the danger, knowing of its

existence, and suffers damage, is not prevented from recovering for the damage, if under the circumstances it was not inconsistent with common prudence to run the risk. *Clayards v. Dethick*, 12 Q. B. 439; *Thompson v. North Eastern Railway Company*, 2 B. & S. 106. As to the doctrine of contributory negligence, see 1 Smith, L. C. 252—255.]

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the path as they find it, they are not liable (*Winch v. Conservators of the Thames*, L. R., 7 C. P. 458; 9 C. P. 389), and they are liable for the negligence of their servants employed in the performance of works. (*Foreman v. Mayor of Canterbury*, L. R., 6 Q. B. 214.) Where an obligation is imposed on a public body in terms absolute, as to keep sewers properly cleansed so as not to be a nuisance, it is understood to be qualified as obliging them to exercise reasonable care and diligence. If they do not know of an obstruction, and could not arrive at such knowledge by the exercise of reasonable care and diligence, they are not liable. (*Hammond v. St. Pancras Vestry*, L. R., 9 C. P. 316.)

Liability for non-repair of highway.

The inhabitants of a parish or county, although liable to repair highways and bridges, are not liable to be sued for an injury caused by their neglect to perform such duty. A surveyor of highways, being their servant or officer, and a public corporation substituted for them, have the same immunity. (*Parsons v. St. Matthew, Bethnal Green*, L. R., 3 C. P. 56; *Gibson v. Mayor of Preston*, L. R., 5 Q. B. 218; *Taylor v. Greenhalgh*, L. R., 9 Q. B. 487.) Nor are they liable for the non-performance of a discretionary power, as when an act provides that the body may fence a pit. (*Wilson v. Mayor of Halifax*, L. R., 3 Exch. 114.) But if they place or maintain an obstruction on the highway, they are liable, as where they were proprietors of a sewer, and a grid placed by them over it in the highway was in a defective condition through their neglect. (*White v. Hindley Board of Health*, L. R., 10 Q. B. 219.)

If, however, he has used such due caution, he will not be liable for injury arising from the interference of a wrong-doer (*x*). Negligence in exercise of a limited right.

Thus in *Daniels v. Potter and others* (*y*), an action was brought for negligently permitting the flap of the defendants' cellar to remain unfastened, whereby it fell upon and broke the plaintiff's legs. It appeared in evidence that the flap was placed in a slanting position, on a projecting ledge, about a foot above the pavement. It was not fastened in any way, but merely leaned against the window of the defendants' warehouse and the house adjoining. One of the plaintiff's witnesses said, that the passing of a stage coach or heavy waggon might have the effect of shaking it down. The defendants' witnesses stated, that the flap was pulled over by some boys who were playing about, and who, though warned by defendants' men, would not go away; and that the flap had been placed in the same way for many years, and that no accident had happened. *Daniels v. Potter.*

Tindal, C. J., said, "The defendants were bound, in placing the flap, to use such precaution as would preserve it under all ordinary circumstances from falling down; but if it was so secured, and a third person over whom they had no control came and removed it, then I think the defendants will not be liable. The plaintiff says, that the flap fell in consequence of the negligence of the defendants; the defendants' case is, that it was placed securely, and that a wrong-doer pulled it over on the plaintiff, and your verdict will be for the plaintiff or defendants, according as you believe the one [273]

[*x*] See *Heedie v. London and North Western Railway Company*, 4 Exch. 244.]

[*y*] 4 C. & P. 262. [See cases cited ante, p. 447, n. (*i*).]

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Potter.*

or the other of these stories. There is no doubt as to the law of the case. The question for your consideration will be, whether upon this occasion the defendants and their servants did use due and ordinary care in placing up this flap so as to prevent any accident from happening. It might certainly have been secured by a string, or by a hook, or by some person holding it, if that were necessary to the security of it. A tradesman under such circumstances is not bound to adopt the strictest means, but he is bound to use such care as any reasonable man looking at it would say is sufficient; and if he does use such care in the placing of the flap, and a wrong-doer comes and displaces it from the position in which it has been placed, it being that in which a careful man would place it, he will not be answerable in an action, but the party must look for compensation to such wrong-doer who so displaced it." *

The jury found for the plaintiff.

*Proctor v.
Harris.*

So, too, in *Proctor v. Harris* (z), where the action was brought against a publican for leaving open a trap-door on the foot-pavement, in the evening, after the lamps were lighted. It appeared that the defendant had, immediately before the accident occurred, been lowering a butt of beer into his cellar through this very aperture.

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Tindal, C. J., in summing up, said, " The question

(z) 4 C. & P. 337.

* He is not answerable to the wrong-doer, although a child or any one acting in concert with him, even if he does not use due care in placing the flap. In such case he is liable to a person innocent of the wrong. (*Hughes v. Macfie*, 2 H. & C. 744; *Mangan v. Atterton*, L. R., 1 Ex. 239.)

is, whether a proper degree of caution was used by the defendant. He was not bound to resort to every mode of security that could be surmised, but he was bound to use such a degree of care as would prevent a reasonable person, acting with an ordinary degree of care, from receiving any injury. The public have a right to walk along these footpaths with ordinary security. It may be said, on the one hand, that these kinds of things must be, and that trade cannot be carried on without them; but, on the other hand, it must be understood that as they are for the private advantage of the individual, he is bound to take proper care, when he is using his cellar, to prevent injury. With respect to the plaintiff, you will have to consider whether there was so little care and caution on his part, that he was himself guilty of negligence in running into the danger. If there had been sufficient light, most likely it would have prevented him from falling in. A more infirm person might have sustained a greater injury than it appears the plaintiff has received. The question is, whether you think this flap was in the nature of a nuisance, used in the manner it was, and whether, looking to all the circumstances, the plaintiff fell in, owing to the negligence and carelessness of the defendant, in not sufficiently protecting the place at this hour, being after dark. If you think so, you will find for the plaintiff. But if you think that the plaintiff did not himself use due caution in the matter, then you will give your verdict for the defendant." *

Negligence in exercise of a limited right.

Proctor v. Harris.

[A similar question arose in *Barnes v. Ward* (a). *Barnes v. Ward.*

[(a) 9 C. B. 392.]

* There was a similar direction to the jury in *Witherley v. Regent's Canal Company*, 12 C. B., N. S. 2.

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*Barnes v.
Ward.*

There, a woman in walking after dark along an immemorial public footway, met with her death by falling down an open unrailed area, of which the defendant was in possession. The area abutted on the way, and was made by the defendant for a house then in the course of erection by him. The action was brought under 9 & 10 Vict. c. 93, by the administrator of the deceased, for negligence, on the part of the defendant, in not having fenced or railed in the area. At the trial, the jury having been directed, that if there was a public way abutting on the area, and it would be dangerous to persons passing unless fenced, or a public way so near, that it would produce danger to the public unless fenced, the defendant would be liable, unless the accident was occasioned by want of ordinary caution on the part of the deceased—gave a verdict for the plaintiff. The defendant moved, on points reserved, for a nonsuit, and also in arrest of judgment, and obtained a rule to show cause. On cause being shown, the court, after taking time to consider their judgment, discharged the rule; and *Maule, J.*, delivering the judgment, said as follows:—"On the part of the defendant, it was argued, that no use which a man chooses to make of his own property can amount to a nuisance to a public or private right, unless it in some way interferes with the lawful enjoyment of that right: that, in the present case, the excavation of the area in no manner interfered with the way itself, or was in any sense hurtful or perilous to those who confined themselves to the lawful enjoyment of the right of way; and that it was only to those who, like the deceased, committed a trespass, by deviating on to the adjoining land, that the existence of the area,

though not fenced, could be in any degree detrimental or dangerous.

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“In support of this view of the subject, reliance was placed on the case of *Blythe v. Topham* (b), where it was held, that, if A. seised of a waste adjacent to a highway, digs a pit in the waste, within thirty-six feet of the highway, and the mare of B. escapes into the waste, and falls into the pit, and dies there; yet B. shall not have an action against A., because the making of the pit in the waste, and not in the highway, was not any wrong to B.; but it was the default of B. himself that his mare escaped into the waste. And, in further support of this doctrine, a passage was cited from the judgment of *Alderson, B.*, in *Jordin v. Crump* (c), where the case is put of a man, who, passing in the dark along a foot-path, should happen to fall into a pit dug in the adjoining field, by the owner of it. ‘In such a case,’ says the learned judge (d), ‘the party digging the pit would be responsible for the injury, if the pit were dug across the road; but, if it were only in an adjacent field, the case would be very different, for the falling into it would be the act of the injured party himself.’ And as to the case of *Coupland v. Hardingham*, it was not only denied to be law by the counsel for the defendant, but it was further argued that, in that case,—as appeared by the original nisi prius record, procured by *Coltman, J.*,—as also in *Jarvis v. Dean*,—the area was in one count alleged to be in the highway.

“But it seems clear to us that, in each of these cases, the area in question was not parcel of the road,

(b) 1 Roll. Abr. 88; Cro. Jac. 158.

(c) 8 M. & W. 782.

(d) 8 M. & W. 788.

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but was an area meant to be fenced off from it, in the ordinary way, by upright iron rails, so as to exclude the public from it, in a manner quite inconsistent with the notion of its being itself part of the highway. And with respect to the case of *Blythe v. Topham*, and the passage cited from the judgment in *Jordin v. Crump*, it must be observed, that, in these instances, the existence of the pit in the waste or field adjoining the road, is not said to have been dangerous to the persons or cattle of those who passed along the road, if ordinary caution were employed.

“In the present case, the jury expressly found the way to have existed immemorially: and they must be taken to have found that the state of the area made the way dangerous for those passing along it, and that the deceased was using ordinary caution in the exercise of the right of way, at the time the accident happened.

“The result is,—considering that the present case refers to a newly-made excavation adjoining an immemorial public way, which rendered the way unsafe to those who used it with ordinary care,—it appears to us, after much consideration, that the defendant, in having made that excavation, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road; for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is, in effect, as much impeded as in the case of an ordinary nuisance to a highway.

“With regard to the objection, that the deceased was a trespasser on the defendant's land at the time the injury was sustained,—it by no means follows from this circumstance that the action cannot be maintained. A

trespasser is liable to an action for the injury which he does: but he does not forfeit his right of action for an injury sustained. Thus, in the case of *Bird v. Holbrook* (e), the plaintiff was a trespasser,—and, indeed, a voluntary one,—but he was held entitled to an action for an injury sustained in consequence of the wrongful act of the defendant, without any want of ordinary caution on the part of the plaintiff, although the injury would not have occurred, if the plaintiff had not trespassed on the defendant's land. This decision was approved of in *Lynch v. Nurdin* (f), and also in the case of *Jordin v. Crump*, in which the court, though expressing a doubt as to whether the act of the defendant in setting a spring-gun was illegal, agreed, that, if it were, the fact of the plaintiff's being a trespasser would be no answer to the action. For these reasons, we are of opinion that the declaration in this case discloses a good cause of action."

Negligence in exercise of a limited right.

Barnes v. Ward.

"The principle of the above decision," said *Martin*, B., delivering judgment in *Hardcastle v. South Yorkshire Railway, &c. Company* (g), "was that such an excavation was a public nuisance, and that an individual injury arising from such a nuisance was the subject-matter of an action to the party aggrieved.

Hardcastle v. South Yorkshire Railway, &c. Company.

"When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage-way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when

(e) 4 Bing. 628; 1 M. & P. 607. (g) 4 H. & N. 67.
(f) 1 Q. B. 37; 4 P. & D. 677.

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exercise of a
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*Hardcastle v.
South York-
shire Railway,
&c. Company.*

the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road on a dark night and losing his way may wander to any extent, and if the question be for the jury, no one could tell whether he was liable for the consequences of his act upon his own land or not. We think that the proper and true test of legal liability is, whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise,—if in every case it was to be left as a fact to the jury whether the excavation were sufficiently near to the highway to be dangerous.

“When a man dedicates a way to the public, there does not seem any just ground, in reason and good sense, that he should restrict himself in the use of the land adjoining to any extent, further than that he should not make the use of the way dangerous to the persons who are upon it and using it; to do so would be derogating from his grant: but he gives no liberty or licence to the persons using the way to trespass upon his adjoining land (*h*), and if they in so doing come to misfortune, we think they must bear it, and the owner of the land is not responsible. If fences are to be put up, it would seem more reasonable that they should be put up by those who use the way, or those who are under the obligation to repair it, than by the person who dedicated it to the public, or his successors. As we are clearly of opinion that there is no such obligation to fence, as alleged in the declaration, and also that, upon

(*h*) *Hounsell v. Smyth*, 7 C. B., N. S. 731, shows that the mere fact of giving such licence would not make him responsible.]

the above state of facts, there is no liability, our judgment is in accordance with the principle of the case of *Blythe v. Topham* (ubi supra), which we think is a true one."] *

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Hardcastle v. South Yorkshire Railway, &c. Company.

* If a highway runs by the side of an ancient ditch, the owners of the ditch are under no obligation to fence it against the highway. (*Cornwell v. Metropolitan Commissioners of Sewers*, 10 Ex. 771.) Nor are the parish bound to fence it when it is on the side of a precipice and has never been fenced. (*Rex v. Whitney*, 7 C. & P. 211.) If a highway is dedicated with steps or a projecting cellar flap upon it, the owners of the steps or the flap are not responsible for accidents to persons falling over them. (*Fisher v. Prowse*, 2 B. & S. 770; *Le Nere v. Mile End Vestry*, 8 E. & B. 1054; *Morant v. Chamberlin*, 6 H. & N. 541; *Mercer v. Woodgate*, L. R., 5 Q. B. 26; *Arnold v. Blaker*, L. R., 6 Q. B. 433.) On the same principle, where a highway consisted of a flagstone and grating over a gulf, and the flag and grating were out of repair and unequal to bear the weight of a person standing on it, but gave way with him and he was killed, it was held that the owner of the flagstone and grating was not bound to keep them in repair, and therefore was not responsible. (*Robbins v. Jones*, 15 C. B., N. S. 221.) The court say, "This case is not the same as that of an open cellar flap, which may be considered as a trap in its nature and essence unless it be kept shut. Besides, that is worn out by use for the benefit of the occupier of the cellar, of which it is the door. The present case is nearer that of a mine propped up and of a way dedicated upon the surface. In such a case will any one venture to suggest that the owner of the mine and surface, or either of them, must renew the props when they rot and the road threatens to sink into the mine. This does not fall within the law as to keeping buildings adjoining the highway in such a state, by repair or otherwise, as not to endanger passers by. What was insufficient here was part of the highway itself. Such law may apply to the arches of a cellar under a footway, though this, we conceive, may be worthy of argument and open to distinctions as to the state of things at the time of the dedication and other circumstances." (15 C. B., N. S. 241.)

Way.

Excavation before dedication.

Robbins v. Jones.

If after the dedication of a highway an excavation is made so near it as to be dangerous to persons using it with ordinary care, he who makes or maintains it must keep it fenced, and is liable for accidents caused by his neglecting to do so. (*Coupland v. Hardingham*, 3 Camp. 398, as explained in *Cornwell v. Metropolitan Commissioners of Sewers*, 10 Ex. 771, and *Fisher v. Prowse*, 2 B. & S. 781; *Barnes v. Ward*,

Excavation, &c., after dedication.

- Way. 9 C.B. 392; *Bishop v. Trustees of Bedford Charity*, 1 E. & E. 697; *Hadley v. Taylor*, L. R., 1 C. P. 53.)
- Licence to use land no obligation to make it safe. A man who allows another to use his land is a giver. "The principle of the law as to gifts is that the giver is not responsible for damage resulting from the insecurity of the thing given, unless he knew its real character at the time and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable." A person licensed to use land must take it as he finds it. Thus the possessors of a cutting and a bridge over the cutting, who allowed the public to use the bridge, were held not liable for the death of a person who fell into the cutting through the defective condition of the bridge. (*Gautret v. Egerton*, L. R., 2 C. P. 371; *Binks v. South Yorkshire Railway Company*, 3 B. & S. 244.) The law is the same in the case of a guest, who cannot sue his host for negligence if injured by the defective condition of his house, as by a pane of glass from a door falling upon and cutting him. (*Southcote v. Stanley*, 1 H. & N. 217.) In *Watling v. Oustler* (L. R., 6 Ex. 77), *Kelly*, C. B., says, of *Southcote v. Stanley*, this case does not seem to me satisfactory.
- Obligation not to make it unsafe. In *Corby v. Hill* (4 C. B., N. S. 556), the owner of land permitted it to be used as a roadway by persons coming to his house. The plaintiff, whilst using it with such permission, drove against some building materials which had been placed on the roadway by the defendant, also by the permission of the owner, without notice to the plaintiff. He was held liable, because the proprietor of the road, having held it out as a safe and convenient mode of access to his establishment without any reservation, it was not competent for him to place thereon any obstruction calculated to render the road unsafe. (See *Pickard v. Smith*, 10 C. B., N. S. 479.) In *Bolch v. Smith* (7 H. & N. 736), where a dangerous obstruction to a way used by permission was apparent, the defendant was held not liable.
- Mining shaft. Fencing. If a mine owner makes a shaft in the surface under a licence, he is bound to fence it to prevent danger to the cattle of the owner of the surface. "Where a party alters things from their normal condition, so as to render them dangerous to acquired rights, the law casts on him the obligation of fencing the danger, so that it shall not be injurious to those rights." (*In re Williams and Groucott*, 4 B. & S. 149.)
- Duty to protect customer. "It is the duty of a canal or dock company, who make a canal or dock for their profit and open it to the public on payment of tolls, not perhaps to repair the canal or absolutely to free it from obstruction, but to take reasonable care that so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property." (Per Cur., *Parnaby v. Lancaster Canal Company*, 11 A. & E. 242; *Thompson v. North Eastern Railway Company*, 2 B. & S. 106.) A tradesman is liable to a cus-

tomers if he leaves a trap-door open in the usual passage to his shop. (*Chapman v. Rothwell*, E. B. & E. 168.)

A railway company is liable for an injury to a passenger if their station is not sufficiently lighted to enable him to move about with safety (*Martin v. Great Northern Railway Company*, 16 C. B. 179; 4 H. & N. 781); or if a part of the station along which the passenger is invited to go is in a dangerous condition (*Nicholson v. Lancashire and Yorkshire Railway Company*, 3 H. & C. 534; *Longmore v. Great Western Railway Company*, 19 C. B., N. S. 183); but not unless the station is more than ordinarily dangerous (*Roberts v. Great Western Railway Company*, 4 C. B., N. S. 526; *Davis v. London and Brighton Railway Company*, 2 F. & F. 588); and the accident was one which could not have been reasonably anticipated by the company (*Cornman v. Eastern Counties Railway Company*, 4 H. & N. 781; *Crafter v. Metropolitan Railway Company*, L. R., 1 C. P. 300); or happens through the passenger going to a part of the station where he was not invited (*Toomey v. London, Brighton and South Coast Railway Company*, 3 C. B., N. S. 146); or without fault of the company, as by a stray dog coming into the station. (*Smith v. Great Eastern Railway Company*, L. R., 2 C. P. 4.)

A railway company is bound to afford its passengers reasonable facilities for alighting at the station to which they agree to carry him; and if they fail in so doing, and he is injured in consequence, without fault on his part, they are liable. Where the train has come to a final standstill in a place not opposite the platform, in the dark (*Cockle v. London and South Eastern Company*, L. R., 5 C. P. 457; 7 C. P. 321; *Weller v. London, Brighton and South Coast Railway*, L. R., 9 C. P. 126), or in the light, and there is no indication of an intention to bring it opposite the platform (*Robson v. North Eastern Railway Company*, L. R., 10 Q. B. 271), or where their servants assist him in alighting (*Foy v. London, Brighton and South Coast*, 18 C. B., N. S. 225), or where the name of the station is called out, and the train stops in the dark (*Bridges v. North London Railway Company*, L. R., 7 H. Lds. 213; 6 Q. B. 377), there is evidence from which a jury may infer negligence, from the company having led the passenger to believe that the train had arrived at a place where they meant him to alight, and not affording him reasonable facilities to do so. So where the train stops opposite the platform, and afterwards moves while the passenger is alighting. (*Reynolds v. London and South Western Railway Company*, 5 W. N. 244.) On the other hand it has been held that, where the train is too long for the platform, and the carriage in which the passenger is shoots beyond, and he, knowing this, alights before he has reason to believe that his carriage will not be pushed to the platform

Duty to protect customer.

(*Siner v. Great Western Railway, L. R., 3 Exch. 150; 4 Exch. 117*), and where the name of the station is called out, and the train afterwards stops, and the passenger alights before he has reason to believe that the train has come to a final standstill (*Lewis v. London, Chatham and Dover Railway Company, L. R., 9 Q. B. 66*), there is no evidence of negligence. In this last case a learned judge remarked that calling out the name of the station was not an invitation to alight, but merely a notice that the train was passing it. This is hardly reconcilable with the decision of the House of Lords in the more recent case of *Bridges v. North London Railway Company*. There the porters first shouted the name of the station, and then, "Keep your seats." The passenger stepped out of the carriage between the two shouts and was killed. The Lord Chancellor considered the second shout a revocation of the invitation conveyed by the first. If the doctrine of the learned judge is right, the porters were merely adopting a practice which, from its prevalence in Westminster Hall, may be termed legal, of saying the same thing twice in different words.

Theatre.

An accident happened in a place of public entertainment from the falling of a staircase, which had been altered by the proprietors. It was held that they were not liable for latent defects which they had no reason to suspect, and it was left to the jury to say whether they had used due care in the alteration of the staircase. (*Brazier v. Polytechnic, 1 F. & F. 507; Pike v. same, 1 F. & F. 712.*)

Stand at race-course.

A person inviting another on a stand at a racecourse or a hulk for reward, is responsible for any danger hidden from the customer, but which the invitor could have discovered by the exercise of reasonable care, and he is not only liable for his own negligence, but for the negligence of all others concerned in the erection of the stand or the management of the hulk. (*Francis v. Cockrell, L. R., 5 Q. B. 184, 501; John v. Bacon, L. R., 5 C. P. 437.*) But a person who takes in goods to warehouse in a permanent building, such as a carriage in a shed, has been held only responsible for the negligence of himself and his servants; he does not warrant that care has been used by others in the erection of the building. (*Searle v. Laverick, L. R., 9 Q. B. 122.*) The one case is analogous to a letting to hire of a chattel, and there is an implied warranty that reasonable care has been used in making the building, &c. fit for the purpose of the letting; the other is a bailment, classed by Lord Holt as of the fifth sort, a delivery to carry or otherwise manage for reward, and the bailee is not chargeable with the trust further than the nature of the thing puts it in his power to perform.

Who are customers.

A workman, whether master or servant, coming to a building to perform a contract, in which both the workman and the owner of the building are interested, is in the same position as a customer, and en-

titled to be protected by the occupier against a dangerous pitfall, which is unknown to him, either by a fence or safeguard about the hole or reasonable notice to the workman to avoid the danger. Such a visitor, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall use reasonable care on his part to protect him from unusual danger, which the occupier knows or ought to know. (*Indermaur v. Dames*, L. R., 1 C. P. 274; 2 C. P. 311.)

Who are customers.

A man visiting a ship in a dock on business recovered against the dock company for injury sustained through a gangway provided by them for access to the vessel being insecure. (*Smith v. London and St. Katherine's Dock Company*, L. R., 3 C. P. 326.) Another, coming to a railway station for coals, who, while proceeding to unload his waggon in an unusual way, but with the permission of the station master, fell through a defective flap, recovered, because the way was used by him for a purpose connected with the performance of the company's contract with him. (*Holmes v. North Eastern Railway Company*, L. R., 4 Exch. 254; 6 Exch. 123.) A passenger of one railway company, while in the station of another, was run over by a truck driven by one of their porters. The owners of the station and masters of the porter were held liable, because it was a misfeasance of their servant, and the plaintiff was in their station on the same conditions as if he had been one of their passengers. (*Tebbutt v. Bristol and Exeter Railway Company*, L. R., 6 Q. B. 73.) But where a man is received as a passenger by the company, on condition that he travels at his own risk, they are not liable to him, even if their premises are in such a state as to expose him to undue or unreasonable danger. (*Gallin v. London and North Western Railway Company*, L. R., 10 Q. B. 212.)

If the building is not unusually dangerous, the occupier is not liable to a person coming there on business and injured by his ignorance of the premises, as by falling down a staircase in the dark. (*Wilkinson v. Fairrie*, 1 H. & C. 683.)

The relation of master and servant bears no analogy to a gift. It is mutually beneficial. Lord Cranworth has stated the law to be that "a master employing a servant on any work, and particularly on a dangerous work, such as mining, is bound to take care that he does not induce them to work on the faith that they are working with good and sufficient tackle, whilst he is employing insufficient tackle, and, being negligent, such negligence occasioning loss to them." On this principle the owner of a mine was held liable for the death of a miner by a stone falling on him, which the master, after notice of its danger, had neglected to remove. (*Paterson v. Wallace*, 1 Macq. 748.) The same law prevailed where the planking was insufficient and the miner objected to

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it, stopped his work, and was killed by the fall of a stone owing to the defective planking while so leaving his work. (*Bryden v. Stewart*, 2 Macq. 30.) In *Barton's Hill Coal Company v. Reid* (3 Macq. 266), Lord *Cranworth* says that these cases proceeded on the principle that when a master employs his servant on a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect his servant from unnecessary risks. (Cited per *Byles, J.*, *Searle v. Lindsay*, 11 C. B., N. S. 439; see also per Lord *Campbell*, *Ormond v. Holland*, E. B. & E. 105.) In *Roberts v. Smith* (2 H. & N. 213), the servant was injured by falling from a scaffold. The master had forbid one of the workmen from testing the putlogs by which it was supported. The Exchequer Chamber held that there was evidence of negligence by reason of the master's personal interference in the works. In *Holmes v. Clarke* (6 H. & N. 349), *Clarke v. Holmes* (7 H. & N. 937), the plaintiff was injured while oiling machinery in the course of his service. When he entered the service the machinery was fenced; afterwards the fencing broke away, of which he complained, and the defendant promised that it should be restored. The jury found that there was no negligence on the plaintiff's part. The court held, that the master, by promising that the machinery should be restored, took upon him the responsibility of any accident that might occur during the period of its being unfenced. In *Williams v. Cough* (3 H. & N. 258), an action for a personal injury was held good which charged that the master, knowing a ladder to be unsafe, deceitfully directed his servant to ascend it, and the plaintiff not knowing the contrary, was injured in obeying him. In *Ashworth v. Stanwix and Walker* (3 E. & E. 701), the defendants were the lessees of a coal pit, and the plaintiff a pitman employed by them. Walker, one of the defendants, acted as banksman; a tramplate became loose, and while Walker was acting as banksman, and after he had been told of the defect of the tramplate, it fell upon the plaintiff. It was contended that Stanwix was not liable, because Walker was a fellow workman with the plaintiff; but the court held that the defendants were jointly liable. They say, "Though the chance of injury from the negligence of fellow servants may be supposed to enter into the calculation of a servant in undertaking the service, it would be too much to say that the risk of danger from the negligence of a master when engaged with him in their common work enters in like manner into his speculation. From a master he is entitled to expect the care and attention which the superior position and presumable sense of duty of the latter ought to command. The relation of master and servant does not the less subsist because by some arrangement between the joint masters one of them takes on himself the func-

tious of a workman." *Mellers v. Shaw* (1 B. & S. 437) is a similar case. The plaintiff was injured by being falling on him from the sides of the shaft of a mine, owing to its being unlined, and one of the defendants was the manager of the mine. It was considered as proved that he knew the mine was unlined, and that it ought to have been. The court held the defendants liable on the ground that one of them knew of the danger to the plaintiff and neglected to guard against it; the plaintiff not knowing of it, nor consenting to incur it.

Duty to protect servant.

Where a master employed a servant on machinery which the master knew to be defective, and by reason thereof the servant was injured, the master was held liable, though it was not alleged that the servant was ignorant of the danger. (*Watling v. Oastler*, L. R., 6 Exch. 73.) A publican, who knowingly allowed a gas pipe to be out of repair, which resulted in an explosion, to the injury of his servant, was held liable for having, by his negligence, exposed his servant to an unreasonable risk. (*Warren v. Wilde*, 7 W. N. 87.)

But the master does not undertake with the servant that his property in which the servant is employed shall be in proper repair, and is not liable to the servant for any vice or imperfection in it unknown to the master. Thus, in *Priestley v. Fowler* (3 M. & W. 1), it was held, that there was no duty on the master to take due and proper care that a van in which his servant was travelling on his business should be in a proper state of repair and not overloaded, and that the servant should be safely and securely carried in it. The court there say, "The master is no doubt bound to provide for the safety of his servant in the course of his employment to the best of his judgment, information and belief. In the employment described in the declaration the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, &c." In *Seymour v. Maddox* (16 Q. B. 326) the defendant was possessed of a theatre, and the plaintiff was employed by him in it as a chorus singer. There was a floor underneath the stage, along which the performers were used to pass from the stage to the dressing-room, in which was a cut or hole. The court held that there was no duty on the defendant to cause the floor to be lighted and hole fenced so as to prevent accidents to persons passing from the stage to the dressing-room. *Erle, J.*, says, "I confine my judgment to this ground, that the declaration does not show any contract that the premises shall be in any particular state with respect to lighting, or any misfeasance." In *Couch v. Steel* (3 E. & B. 402), an action against a shipowner by a mariner for injuries caused by the ship being leaky and unseaworthy, the declaration was held bad, because there was no allegation of knowledge and deceit, nor any express warranty. (See 34 & 35 Vict. c. 110, s. 11; 38 & 39 Vict. c. 88, s. 4.)

Priestley v. Fowler.

Negligence of fellow servant. The master is not responsible to a servant for an accident happening through the negligence of a fellow servant, on the ground that the servant knows when he enters the service that he is exposed to the risk of injury, not only from his own want of care and skill, but also from the want of it on the part of his fellow servant, and he must be supposed to have contracted on the terms that as between himself and his master he will run this risk. But he has a right to understand that the master has taken reasonable care to protect him from such risks by associating with him only persons of ordinary care. (*Hutchinson v. York, Newcastle & Berwick Railway Company*, 5 Ex. 343; *Wigmore v. Jay*, 1b. 354; *Tarrant v. Webb*, 18 C. B. 797; *Ormond v. Holland*, 11 B. & E. 102; *Griffiths v. Gidlow*, 3 H. & N. 648; *Barton's Hill Coal Company v. Reid*, 3 Macq. 266; *Searle v. Lindsay*, 11 C. B., N. S. 429.)

Morgan v. Vale of Neath Railway Company. The prevailing principle is thus stated in *Morgan v. Vale of Neath Railway Company* (5 B. & S. 578), by *Blackburn, J.*: "A servant who engages for the performance of services for compensation, does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services, the presumption of law being that the compensation was adjusted accordingly, or, in other words, that those risks are considered in his wages." The judgment was affirmed in error (5 B. & S. 741; L. R., 1 Q. B. 154), *Erle, C. J.*, observing that the principle was put very clearly by *Blackburn, J.*, and *Pollock, C. B.*, adding that by a decision in favour of the plaintiffs they would open a flood of litigation, the end of which no one could foresee.

Common employment. Some cases favour the notion that to bring a case within this rule the servants should be engaged in a common employment, and this has had a liberal interpretation. (*Waller v. South-Eastern Railway Company*, 2 H. & C. 102; *Lovregrove v. London, Brighton and South Coast Railway Company*, 16 C. B., N. S. 669; *Tunney v. Midland Railway Company*, L. R., 1 C. P. 291.)

The rule is not so limited. It is sufficient if the servants are employed by the same master; they need not be employed at the same time. Thus the master is not liable for an injury happening to his servant through the negligence of another servant, committed before the servant injured entered the service. (*Brown v. Accrington Cotton Company*, 3 H. & C. 511; *Wilson v. Merry*, L. R., 1 H. Lds., Sc. 326.)

Who a servant. The rule as to common employment applies where the servants are not in the employ of the same master, as in the case of a servant of a sub-contractor who is for this purpose considered as the servant of the contractor, and cannot sue him for the negligence of his servant.

(*Wiggett v. Fox*, 11 Ex. 832.) A volunteer helping the servants in their work is not in a better position than a servant, and cannot sue the master if injured by the negligence of one of his workmen. (*Degg v. Midland Railway Company*, 1 H. & N. 773; *Potter v. Faulkner*, 1 B. & S. 800.) But a pilot whom a shipowner is bound to employ is not his servant nor a volunteer, and the shipowner is liable to him for the negligence of his mariners. (*Smith v. Steele*, L. R., 10 Q. B. 125.) The servant of a customer of a railway company coming to the station to receive goods, and assisting the servants of the company in delivering them, is in the same position. (*Wright v. London and North Western Railway Company*, L. R., 10 Q. B. 298; *Abraham v. Reynolds*, 5 H. & N. 143; *Fletcher v. Peto*, 3 F. & F. 368.) Where servants are employed by independent masters, though in some sense engaged in a common employment, as in the case of two railway companies using a station in common, one master is liable for the negligence of his servant to the servant of the other. (*Vose v. Lancashire and Yorkshire Railway Company*, 2 H. & N. 728; *Warburton v. Great Western Railway Company*, L. R., 2 Exch. 30.)

The infancy of the servant does not take him out of the rule. In this case the law implies as part of the contract of an infant between ten and twenty-one, that in consideration of the agreement to pay him wages, the infant should undertake the personal risks to which he is liable, although his wages are lower and the risk of personal injury greater by reason of his youth and inexperience, and he is frequently, if not always, employed because his labour is cheaper than that of a man, and the profits of his master by consequence larger, and sometimes because he can be induced or even forced into dangers which a man would not encounter. This is one of those just and necessary contracts by which alone infants are bound; and an agreement to pay 2s. 6d. for one week to a child of ten years old, though he may be disabled before he has earned his first week's wages, is considered a sufficient compensation for the loss of a limb, making him a cripple and a pauper for life. He has no remedy against the man whose wealth is increased by the cheapness of his labour. (*Hall v. Johnson*, 3 H. & C. 589; *Murphy v. Smith*, 19 C. B., N. S. 361; see *Grizzle v. Frost*, 3 F. & F. 622, *contra*.) By the same law, if a young gentleman purchases an article of mere ornament, or a present for a friend, and does not pay for it, he cannot be made to. (*Peters v. Fleming*, 6 M. & W. 42; *Ryder v. Wombwell*, L. R., 3 Exch. 90.) In the one case the law makes for the infant a contract, the effect of which is to deprive him of his life or his limb; in the other it exonerates him from a contract made by himself, the effect of which is to diminish his property by a few pounds.

The rule extends to a superior servant, whose lawful directions the inferior servant is bound to obey. Thus a master is not liable for

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Infant servant.

Superior servant.

Superior servant.

negligence of a foreman or manager if the master himself retains the control of the establishment. (*Hall v. Johnson*, 3 H. & C. 589; *Murphy v. Smith*, 19 C. B., N. S. 361; *Feltham v. England*, L. R., 2 Q. B. 33; *O'Byrne v. Burn*, cited per Lord Cranworth in *Barton's Hill Coal Company v. Reid*, 3 Macq. 295.)

Three righteous judgments.

It has been held by the House of Lords, in *Paterson v. Wallace* (1 Macq. 748), and by those excellent judges, *Cockburn*, C. J., in *Grizzle v. Frost* (3 F. & F. 622), and *Dyles*, J., in *Gallagher v. Piper* (16 C. B., N. S. 695), dissenting from the rest of the court, and *Williams*, J., being inclined to agree with him, that a master is responsible to the servant for the negligence of his manager or deputy. These three righteous judgments, like Noah, Daniel and Job, stand by themselves.

Wilson v. Merry.

The House of Lords is not always in the same mind. It has been recently held by that august tribunal, that the master does not contract to execute in person any part of the work connected with his business: He is only bound to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. (*Wilson v. Merry*, L. R., 1 H. Lds., Sc. 326.) A corporation is not liable to its servant for the negligence of another servant, and is not liable to the servant or any one else for the negligence of its agent. (*Howells v. Landore, &c. Company*, L. R., 10 Q. B. 62.) This is a good rule for the wealthier masters, who adopt a masterly inactivity. They are safe, unless they personally employ a person they know to be incompetent, or personally use materials they know to be defective. Their strength is to sit still. It is a better rule for corporations, such as railway companies, who distribute their dividends over so large an area. They are incapable of personal negligence, and can only act through servants or agents. To them it is an absolute immunity.

The cases establish that the master is liable if he has not exercised reasonable care in the appointment of the servant by whose negligence the injury is caused. He is also liable if he continues to employ servants who to his knowledge are guilty of negligence dangerous to their fellow servants, and knows and acquiesces in their negligence. (*Senior v. Ward*, 1 E. & E. 385.)

Volenti non fit injuria.

But if the servant injured also knows of the negligence and voluntarily continues in the employment, the maxim *volenti non fit injuria* applies, and the master is not liable. (*Senior v. Ward*; see also *Skipp v. Eastern Counties Railway Company*, 9 Ex. 223.) The maxim does not apply to one who undertakes dangerous work in the ordinary course of his employment, though it does if he undertakes extra risk for extra wages. If the master is in default, it must appear that the servant knew the nature of the risk which, in consequence

of such default, he was exposed to. (*Britton v. Great Western Cotton Company*, L. R., 7 Exch. 138.)

The implied contract that the servant is to run the risks of the service in consideration of his wages is displaced by an express one. (*Holmes v. Clarke*, 6 H. & N. 349; 7 H. & N. 937.)

This rule of law has not been altogether approved by the legislature. Many checks have been placed on the selfishness of masters, and provisions introduced for the protection of servants in the numerous acts relating to factories and workshops, mines and shipping. These provisions have gradually made the protection of servants wider, while the judge-made law has been making it narrower. Factory Acts, &c.

To revert to the law of bailments, so closely connected with this subject. The contract between master and servant is a contract of hiring. The master hires the servant and his services. The servant is both the bailment and the bailor. The warranty of fitness implied against a letter to hire is implied against him. (*Harmer v. Cornelius*, 5 C. B., N. S. 236.) He places himself under the command of the master to serve him on his carriage, in his ship, in his building, in the midst of his machinery—it may be of the most complicated description, which the master and those in privy with the master fully understand, but of which he is comparatively ignorant—on his railway, sometimes extending for several hundred miles, and with other servants appointed by his master, some above, some below, some in a line with him, and often numerous as an army. He, in the course of his business, may come in contact with other servants of the same master of whom he can know nothing, not even that they are servants of the same master. All the profits of the service beyond his wages (sometimes millions) belong to the master. His wages are a fixed sum—a bare compensation for the wear and tear of his bones and muscles—calculated not with reference to the risks he runs, but to his skill in his work. In proportion to his skill, his wages are more and his risk less. It stands admitted that his wages are insufficient to defray all the expenses that properly belong to him; for instance, the education of his children is in great part provided by charity or the State. According to Lord Holt, a hirer is bound to take the utmost care of the thing hired, such as the most diligent father of a family uses. (*Coggs v. Bernard*, 2 Ld. Ray. 916.) Lord Abinger, in *Priestly v. Fowler* (3 M. & W. 6), seems to refer to this principle when he says, “The mere relation of master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to take for himself. He is no doubt bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information and belief.” Knowledge is important in determining the extent of responsibility in these cases. Means of know- Contract of servant a bailment.

ledge is the same as knowledge. On this principle the letter to hire of a chattel, who knows or has the means of knowing more about it than the hirer, is presumed to warrant its fitness for the purpose for which it has been let, or at all events that reasonable care has been used to make it fit, by himself, and all who are in privity with him. (Pothier, Louage, n. 110, 114, cited Story, Bailments, 259.) Pothier has been recognized as an authority on this subject in *Blakemore v. Bristol and Exeter Railway Company* (8 E. & B. 1050), and in *Searle v. Laverick* (L. R., 9 Q. B. 128); see also *Francis v. Cockerell* (L. R., 5 Q. B. 184, 501), *Fowler v. Lock* (L. R., 7 C. P. 272; 10 C. P. 90). The master knows, or has the means of knowing, the defects of all the instruments employed by him in his business, whether servants or machines. He appoints or selects them, and has, or can have, a remedy against the servant or tradesman supplying the machine for any defect. The servant has not necessarily any knowledge or means of knowledge in this respect. With regard to his fellow servants, and the machines used by his master in his business, he stands in the position of hirer. He is bound to his master to take due care with respect to them, so as not to injure his master, has no control over them, has no remedy against the tradesman who supplies the machine if injured by his negligence, because the privity of contract is between the tradesman and the master, and the master may release him from his contract. (*Winterbotham v. Wright*, 10 M. & W. 109). A similar principle would probably apply should he seek his remedy against his fellow servant for negligence. The privity is the same; the right to release and accept satisfaction the same. If he is injured by the master's personal negligence, his claim is on the contract, as is proved by the fact that he can sue the firm in which the negligent master is a partner. (*Mellors v. Shaw*, 1 B. & S. 437.) His fellow servant might set up the same presumed contract, as in *Morgan v. Vale of Neath Railway Company* (L. R., 5 B. & S. 570), and say, "In consideration of the wages paid you by master, you agreed to make no complaint if injured by me." The law of privity would seem to require that the master should be responsible to the servant for the negligence of those who are or may be, if he pleases, responsible to him. It has been applied against the servant, why should it not be applied in his favour?

**Reasons for
the law.**

The reasons given for this law are various. The first case was decided against the servant, because it was without precedent, and was a new and unheard-of action. This ground of complaint soon ceased; then it was the flood of litigation. Again, it has been said that the servant knows better than the master the qualities of the other servants and property of the master. Although this may be true in the case of a butcher boy injured by his master's cart, which it was his duty to look after, or of a domestic servant, it is not in the case of a sailor shipped

on an unseaworthy ship just as it is about to sail, with all its defects under water, and signing articles before he has seen it, or of a railway servant injured, 100 miles from the place where he was engaged, through the negligence of a man he has never heard of before. There is a contract by the servant to run all risks ; there is no contract by the master. The relation between master and servant is internal and not external, as if judges were not physicians as well as surgeons, and bound to apply remedies for maladies of both sorts.

'The common sense of servants rebels against this law. Witness the many actions they have brought. The common sense of masters does not confirm it. When a servant is slain or mutilated in a master's business, assisting to make his fortune, he feels and knows that a claim on him arises different in nature from that which a sufferer by a calamity has upon the public. Some masters make compensation as a matter of right ; others, while deploring the accident and not admitting legal liability, are willing to make the servant a present. None recommend the applicant to seek a general subscription, or mock him by telling him that the wages he has received are the agreed compensation for his loss.

Common sense
of servants
and masters.

Priestley v. Fowler, the first case on this subject, was decided in 1837. It was the case of a butcher's servant injured by a latent defect in his master's van ; and although Lord *Abinger* went a little out of his way to warn a litigious footman not to expect damages from his master if the coachman jogged him from the footboard of the carriage, or the chambermaid failed to make him comfortable in bed, it afforded no authority for the subsequent decisions as to the non-liability of the master to one servant for the negligence of another. Indeed ten years afterwards, 1847, *Armsworth v. South Eastern Railway Company* (11 Jur. 758) was tried in Surrey before Baron *Parke*, the leading spirit of the Court of Exchequer, a judge who, from the day he took his seat on the judicial bench to the day he left it, was pre-eminent among judges for the extent and accuracy of his legal knowledge, his facility in applying it, and the appropriate and vigorous language in which he expounded the law—the oracle of the law. It was an action by the widow of a labourer in the service of the company, who, while travelling to his work on a ballast truck, was killed by the negligence of their engine driver. His lordship thus left the case to the jury:—"The question you will have to consider is whether a case of negligence, that is, want of reasonable care on the part of the defendants or their servants, is made out." The jury found for the plaintiff 100*l.* damages. The company were represented by three of the most able counsel then at the bar, Channel, serj., Shee, serj., and Bodkin. No attempt was made to impeach the ruling of the learned judge. *Hutchinson's case*, the first which decided that a master was not liable to a servant for the negligence of a fellow servant, occurred in 1850. It was decided on the

The three
first cases.

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SECT. 5.—*Legalization of Nuisances.*Nuisance,
what.

The term nuisance is applied, in the English law, indiscriminately, both to disturbances of an easement already acquired, and infringements upon the natural rights of property, for which an action can be sustained. Strictly speaking, however, the term nuisance should be confined to the latter class of injuries only—those acts which, though originally tortious, as infringing the

authority of an imaginary case of two drovers driving a herd of bullocks, one of whom, by some inconceivable act of negligence, injured his fellow. The case has not yet occurred, and has the merit of being perhaps the absurdest hypothetical case ever conceived by the judicial mind. The question occurs, why did the court put the case? It may be that they knew they were about to come to a decision glaringly unjust, and they put a somewhat analogous case, where the injustice was not so glaring, to prepare the way. The fact that in some cases the servant knows more of the dangers of his employment than the master does not warrant a general rule founded on a presumption that he knows it in all. It raises a question of contributory negligence. In the case put by Lord *Abinger*, it is probable that the footman knows more about the chambermaid than the master; and in the case of the two drovers they knew more about each other than Hutchinson, who was travelling as a passenger in the company's service, knew about the two engine drivers by whose negligence he was killed. In *Armsworth's case* the question of contributory negligence was left by Baron *Parke* to the jury.

Cause of the
actions.

A very eminent judge has observed that *Priestley v. Fowler* introduced a new chapter into the law. (*Clarke v. Holmes*, 7 II. & N. 947.) The actions for this cause following *Priestley v. Fowler* are very numerous, and all brought under circumstances of great discouragement. They have not arisen out of the decision in that case, but in spite of it. They have been caused by the high-pressure speed with which we run the race after wealth and pleasure. The weaker, the younger, the less skilful workmen fall by the way and are crushed or torn by the powerful and complicated machinery employed—

“Butchered to make a Roman holiday;”

or, what is much the same thing, to make a good dividend for railway shareholders, and enable them to join Cook's personally-conducted tours to the Nile and the Holy Land.

common law rights of property, may nevertheless, in process of time, confer a prescriptive title by enjoyment. This distinction may be further illustrated by considering, that when the matter of complaint is the disturbance of an easement, the acts done, if allowed to be continued for a certain period, would be evidence to show that no easement existed; whereas, in the case of a nuisance, properly so called, the effect of a similar continuance will be evidence of a right.

Many acts done upon a man's own property, which are in their nature injurious to the adjoining land, and consequently actionable as nuisances, may be legalized by prescription. Thus, the right not to receive impure air is an incident of property, and for any interference with this right an action may be maintained; but by an easement acquired by his neighbour, a man may, it appears, be compelled to receive the air from him in a corrupted state, as by the admixture of smoke or noisome smells, or to submit to noises caused by the carrying on of certain trades. Thus, too, with regard to flowing water, the right not to have impure water discharged on a man's land is one of the ordinary rights of property; the infringement of which can only be justified by an easement previously acquired by the party so discharging it.

Thus, it is said in Viner's Abridg. (*i*), that an ancient brew-house, though erected in Fleet Street or Cheapside, is not a nuisance. So, it seems that an ancient user may be a justification for the exercise of a noisy (*k*)

(*i*) Nuisance, G.

Bing. N. C. 134; S. C. 2 Scott,

(*k*) *Elliotson v. Feetham*, 2 174.

or offensive trade (*l*), or for discharging water in an impure state upon the adjoining land (*m*).

Bliss v. Hall. In *Bliss v. Hall*, *Tindal*, C. J., says, "The plaintiff came to his house clothed with all the rights appurtenant to it; one of which, at the common law, is a right to wholesome untainted air, unless the business which creates the nuisance has been carried on there for so great a length of time that the law will presume a grant from his neighbours in favour of the party who causes it."

"Twenty years' user," said *Park*, J., "would legalize the nuisance." *

(*l*) *Bliss v. Hall*, 6 Scott, 500; ante, p. 272, note (*i*), and the other cases there cited; and see 4 Bing. N. C. 183.
(*m*) *Wright v. Williams*, 1 M. & W. 77; [*Carlyon v. Lovering*, *Stockport Waterworks Company v. Potter*, 7 H. & N. 160.]

* There can be no prescription to make a common nuisance, which is a prejudice to all people, because it cannot have a lawful beginning, by licence or otherwise, being against the common law. Thus a prescription for the inhabitants of a town to lay logs in a highway was held void (*Fowler v. Sanders*, Cro. Jac. 446; *Demell v. Sanders*, Cro. Jac. 490; 2 Rol. Abr. 265; Vin. Abr. Prescription, E.; Com. Dig. Prescription, F. 2), or a prescription to send sewage into a public river. (*Attorney-General v. Barnsley*, 9 W. N. 37.) Nor can there be a prescription to do that which has been declared by statute a public nuisance, as to erect a weir in a navigable river not erected before the time of Edward I. (*Rolle v. Whyte*, L. R., 3 Q. B. 286; *Leconfield v. Lonsdale*, L. R., 5 C. P. 657.) A mere private nuisance, such as a dove-cote, may be prescribed for. (*Demell v. Sanders*, Cro. Jac. 490.) This rule, as applied to highways, is rather verbal than substantial. The decision in *Demell v. Sanders* turned on the circumstance of the defendant having confessed the place where he laid the logs to be a highway, and prescribed for the right to do the act, as though the highway had been dedicated by one man, and the prescription had arisen afterwards. Had he pleaded that the highway was dedicated subject to the right to lay logs there, he might have been more successful, and the usage would have proved such limited dedication. (*Fisher v. Prose*, 2 B. & S. 770; *Robbins v. Jones*, 15 C. B., N. S. 221.)

Some ancient authorities appear to have recognized a species of right to corrupt the air or disturb a natural

Doctrine of coming to nuisance exploded.

Nor does the rule apply where the nuisance is public, in the sense of being injurious to many proprietors, as is an offensive trade. The owners of property affected by such trade may have licensed it, or have taken from the tradesman subject to his right to carry it on. Thus in an indictment for a nuisance for carrying on the business of a melter of grease, Lord *Kenyon* said, "Where manufactories have been borne with in a neighbourhood for many years, it will operate as a consent of the inhabitants to their being carried on, though the law might have considered them as nuisances had they been objected to in time." He left it to the jury to say whether the noxious vapour was much increased by the addition of the defendant. He was acquitted. (*Reg. v. Neville, Peake*, 125 (91); see also *Crumpp v. Lambert*, L. R., 3 Eq. 413.)

In *Wood v. Sutcliffe* (2 Sim., N. S. 163), the Vice-Chancellor says that a manufacturer may acquire a right to pour his polluted water into a stream as against all new comers, so that those below him coming after he has acquired the right may not have the right to complain of what he does to the stream. Thus a right to pollute water may be acquired by twenty years' user. (See *Crossley v. Lightowler*, L. R., 3 Eq. 279; 2 Ch. App. 478; *Baxendale v. McMurray*, L. R., 2 Ch. App. 790.)

A prescription for washing away by means of a stream the sand, stones, rubble and other stuff which become dislodged or severed in the course of working a tin mine, and using the tin and tin ore, is not unreasonable or indefinite, since it is by implication limited to the necessary working the mine and the quantity of water sent down, and though more stuff may come at one time than at another. (*Carlyon v. Love-ring*, 1 H. & N. 797, 800.)

In *Goldsmid v. Tunbridge Wells Commissioners* (L. R., 1 Eq. 169), the Master of the Rolls says, "My opinion is, that any person who has a water-course flowing through his land, and sewage which is perceptible is brought into it, has a right to come here to stop it; and that when the pollution is increasing, and gradually increasing from time to time by the additional quantity of sewage poured into it, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription against him." On appeal, *Turner*, L. J., said that if such a right could be acquired, it could be acquired only by a continuance of the discharge prejudicially affecting the estate, at least to some extent, for the period of twenty years. (L. R., 1 Ch. App. 352; *The Attorney-General v. Luton Board of Health*, 2 Jur., N. S. 180.) A right to carry on an offensive trade, or to pollute

Doctrine of
coming to
nuisance.

easement given by an enjoyment, however short, provided that at the commencement of it no person was in a situation to be injured by such corruption or disturbance; the party afterwards complaining, even though the nuisance was modern, was said to have come to the nuisance, and was held to have no right of action for any injury sustained.

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“If my neighbour,” says Blackstone, “makes a tannery, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue” (n).

It is difficult to see on what principle this doctrine could have been supported, and indeed many of the old authorities are at variance with it, and the recent decisions of the Court of C. P. upon this point appear to have restored the law to an accordance with the general principles of easements.

*Leeds v.
Shakerly.*

In *Leeds v. Shakerly* (o), the declaration stated, that the plaintiff was seised in fee of a mill, and that he and all those, &c., from time whereof, &c., had had a water-course running by three mills, A, B, and C, to his said mill. That the defendant cut the banks of the water-course in A, whereby he lost the profits of his mill.

(n) 2 Com. 402.

(o) Cro. Eliz. 751.

water with sewage, is not acquired merely by having carried on the trade or having drained into the river for twenty years, unless the air over the plaintiff's land, or the water to which he is entitled, has been corrupted for that period. (*Flight v. Thomas*, 10 A. & E. 590; *Murgatroyd v. Robinson*, 7 K. & B. 391.) Until a nuisance arises no one can complain. Thus it is not a nuisance to drain sewage into a river if no one who has a right to use the water is injured. (*Attorney-General v. Kingston-on-Thames*, 11 Jur., N. S. 596.)

After verdict for the plaintiff it was moved in arrest of judgment, "That it was not alleged that the plaintiff was seised of the mill at the time of the cutting." For the plaintiff it was argued that the words, "seisitus existit, ipse qui et omnes illi," &c., have used the water-course, were a sufficient averment of seisin at the time; and that this very objection had been made and overruled in *Dame Browne's case* (p). But all the court (absente *Popham*) held, that the declaration was insufficient for his cause. *Gawdy* said, that, in *Browne's case*, the opinion of Lord *Dyer* was, that the count was insufficient, and error is there brought of the said judgment.

Doctrine of coming to nuisance.

In *Dyer's Report* of the case of *Moore v. Dame Browne*, above referred to, it is said, "But the writ and count were faulty in that the plaintiff was not supposed to be owner of the said site and messuage of Blackfriars at the time of the diversion, but only at the time of the action commenced; whereas the plaintiff is seised, and does not say *was* seised, &c., therefore the plaintiff was not damnified by the diversion; wherefore the plaintiff could not have judgment given." But by *Benloe's Reports* (216), it appears that judgment at length was given. And the roll being searched, it appears judgment was given, and the plaintiff acknowledged satisfaction of the damages, and the defendant afterwards brought a writ of error.

Moore v. Dame Browne.
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In *Tenant v. Goldwin* (q), where it was held, that the plaintiff was entitled to recover damages against the defendant, who had allowed his wall to be out of repair, so that the filth from his forica ran into the plaintiff's

Tenant v. Goldwin.

(p) *Dyer*, 319, b.

(q) 2 Lord *Raymond*, 1089; S.

C. 1 *Salkeld*, 360. [See *Alston v. Grant*, 3 El. & Bl. 128.]

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coming to
nuisance.

cellar, there is the following dictum of Lord *Holt*: "If a man erects a house and a house of office, and the house of office adjoins to a vacant piece of ground which keeps in the filth of the house of office, if the owner of the vacant piece of ground will dig a cellar there, he must make a wall to the house of office."

In the report in *Salkeld*, who was counsel in the case, the above dictum is given with the very important additional term "that the house of office was ancient," and even then it is enunciated as a doubtful position. "The case might possibly be such that the defendant might not be bound to repair, as if the plaintiff made a new cellar under the plaintiff's old privy; or in a vacant piece of ground which lay next the old privy; in such case the plaintiff must defend himself."

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In *Lawrence v. Obce* (*r*), where an action was brought for a nuisance, and it appeared that the nuisance was not felt by the plaintiff until he made a window through which the offensive smell entered, Lord *Ellenborough* is reported to have said, "That the plaintiff, having brought the nuisance upon herself by opening the window, had no right of action." It is fully consistent with the facts stated in the report, that the nuisance might have been an ancient one, and therefore legalized by time. It was not pressed upon the court, that the right to open a window and the right not to have corrupted air imitted upon a man's property, are both common law rights requiring no easement to support them. The wall in which the window was opened was an ancient one, but no point appears to have been raised on that ground.

These dicta, however, appear to be opposed to principle, and to the general current of authority, both ancient and modern.

Doctrine of
coming to
nuisance.

Ric. de D. (s) brings a writ of "Quod permittat" Lib. Ass. against R. and S., and the nuisance was assigned, that, whereas he hath a house in S., with apple, pear, and other trees, bearing fruit, the defendant levied a lime-kiln so near to the house of the said Ric., that, when the kiln was burning, the smoke thereof burnt and scorched the trees, which became dry and unfruitful.

The defendant pleads, that the plaintiff hath no estate in the tenement to which, &c., except as lessee for life under the Abbot de Berg.

The defendant further pleaded, that the lime-kiln was so built and used by the defendant's father before the plaintiff had any interest in the frank tenement; without this, that he had levied any nuisance since, &c. [280]

Upon argument, the court held the plea bad—"If the defendant's father were now alive, the plaintiff would have an assize against him."

Herle, J., said, "It might be he (the father) had the kiln there, but did not use it, and the tort began with the user; or that the tort was begun, and then discontinued, and renewed again, after he was possessed of the frank tenement; and then he shall have his assize. Thus, if my father had a right of way, which was stopped by a hedge or by a ditch levied across it, and the tort was submitted to without debate all the lifetime of my father, and after his death I find the way open, and enter and use it, and am afterwards disturbed by the feoffee of him who levied the hedge, I shall have an assize of nuisance.

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“So here, although we have the kiln before, &c., and the tort begun, if afterwards such tort be discontinued, and then in his (plaintiff’s) time it begin (again) to burn, he shall have an action for such tort.”

Fitz. N. B.

In Fitzherbert (*t*) it is said, “If a man levy a nuisance unto the freehold of another, and he to whom the nuisance is done make a feoffment in fee of the land, and he who did the nuisance make a feoffment of the land in which the nuisance is, yet there is a writ in the Register for the feoffee of him to whom the nuisance was levied against the feoffee of the other to reform that nuisance.”

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Westbourne v.
Mordant.

In *Westbourne v. Mordant* (*u*), which was an action upon the case, the declaration stated that the plaintiff was possessed of a meadow adjoining a certain brook, from the 20th April, et adhuc inde, &c., and that defendant, on the said 20th April, put in divers loads of stones into the said brook, and by it obstupavit aquam illam; that it from the said 20th April to the day of the writ purchased, overflowed his meadow, so that he could not have any benefit from it.

After verdict, it was moved in arrest of judgment, “because the nuisance is supposed to be done before the plaintiff’s title did commence, so no cause of action.”

Gawdy, J., said, “The declaration is good, for an action of the case declareth the whole matter, so that it is not material when the nuisance was erected, for he that is hurt by it shall have an action.”

Fenner, J., agreed, it may be the nuisance was not by the stopping till the running of the water, and the

(*t*) N. B. 124 H. p. 290.

(*u*) Cro. Eliz. 191.

action being brought, as the truth is, is well brought; and *Wray* being absent, they commanded judgment to be entered, if nothing said to the contrary.

Doctrine of
coming to
nuisance.

In *Beswick v. Cunden Hill* (x), the plaintiff declared that the defendant "levied a dam in such a river such a day, whereby it surrounded the land of J. S., who afterwards enclofed the plaintiff thereof, and that defendant adhuc malitiosè custodivit the said dam, whereby the plaintiff's land is surrounded." To this declaration the defendant demurred in law.

*Beswick v.
Cunden Hill.*

In support of the demurrer it was contended, that the plaintiff could not maintain the action, as he had nothing in the land at the time when the nuisance was erected, and 4 Assize, 3, was cited, and no new injury was done; it was admitted that an action would lie if any new act had been done, as the turning of the water-cock in *Dyer*, 319, which made a new nuisance each time.

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On the other side it was said, that the action was not brought for levying the dam, but continuing the same from such a day to such a day, which was after the plaintiff's purchase, &c. *Rolfe's case*, decided in Easter Term, 25 Eliz. (y), was cited, that "where one erected a house so near to another's that the rain descended from the new house, &c., and the heir brought an action upon the case for the nuisance made by building the house in his father's time, he should recover by judgment."

Gawdy and *Popham*, Justices, thought the action was well brought for the continuance; and *Popham* took this distinction between the cases in which no interest

(x) Cro. Eliz. 402.

(y) Cited 5 Rep. 101 a.

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coming to
nuisance.

*Beswick v.
Cunden Hill.*

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remains in the thing obstructed to the party against whom the nuisance is done, and where he still retains some profit or interest therein. In the former case the remedy is provisional only; in the latter it passes to the heir or purchaser. "If I have potwater running from my river to my home, and T. stops it in his land before it comes to my land, and T. die, or make a feoffment over, my heir or feoffee have not any remedy for this tort made before their time; but where any profit remains which comes to the heir or feoffee, after the nuisance done, therefore, for so much of the profit as is come unto them, and is taken from them by the continuance of the nuisance, they shall have their action. Then here, by the levying of the dam, the inheritance of him to whom it was levied is not taken away: but although his land be surrounded, some profit remained unto him, which he hath conveyed to the feoffee, which being taken from him by the continuance of the nuisance, it is reason that the feoffee should have his action; and, therefore, if one levies a bank in a river, whereby part of my land is surrounded, and afterwards I make a feoffment of my land to J. S., and afterwards another part is surrounded by reason of that bank, he shall have an assize of nuisance (*quod fuit concessum*); so here, for that the land of the feoffee grew *a malo ad nejus die in diem*, by reason of the inundation made by this dam, it is reason the feoffee should have his action. The same law is for a nonfeasance, viz. for not repairing of a bank where, &c."

Clench and *Fenner*, Justices, *contrà*, were of opinion, that the feoffment extinguished the tort, "and nothing had been done since the feoffment which the feoffee could punish." Upon its being moved again, the jus-

tices all agreed that the action was well brought, and it was accordingly adjudged for the plaintiff.

Doctrine of
coming to
nuisance.

Another action on the case, between the same parties, for the continuance of a certain bank (quandam molem), appears to have been decided in favour of the defendant on demurrer to the declaration:—"All the justices resolved for the defendant. 1st. That this action upon the case lies not, because, if it were a nuisance, the plaintiff might have his remedy by an assize or quod permittat; and a man shall never have an action on the case where he may have any other remedy, by any writ found in the Register, for this is only given where there wants such a remedy. 2nd. There is not here any offence committed by the defendant, for he allegeth that he kept and maintained a bank, which is, that he kept it as he found it, and that is not any offence done by him, for he did not do anything; and if it were a *nuisance before his time, it is not any offence in him to keep it*; but the plaintiff is to have his remedy to abate it by a quod permittat; and, therefore, this case differs from 4 Ass. pl. 3, for there the using was a new nuisance, but is not so here" (z).

*Beswick v.
Cunden Hill.*

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In the report of the same case in Moore (a), it is stated, "that the bank was levied before the defendant was enfeoffed;" and it was adjudged "by the court, that the action lay for the continuance against the scoffee, and that in such case it would lie against an

(z) Cro. Eliz. 520, nom. *Beswick v. Cunden*.

There appears to be some mistake in the report here, as the defendant not only kept, but also levied the dam, though not in the plaintiff's time. The court appear

to have confounded the right of a plaintiff to sue with the liability of a defendant to be sued for the continuance of a nuisance erected before his estate commenced.

(a) P. 353, nom. *Beswick v. Cunden*.

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coming to
nuisance.

heir; and a case was cited of *Rolf v. Rolf* in this court, where a house was built so near to another house, that the (new) one annoyed the other with continual dropping, and the feoffment was made of the new house; and it was adjudged that an action on the case would lie against the feoffee for the continuance."

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According to this latter report, these cases are only an authority for the position—that the feoffee of a party who erected a nuisance is liable for its continuance—a position which, except in some particular cases, appears hardly to have been questioned.

Rolf v. Rolf.

The report of the case of *Rolf v. Rolf*, as given by Lord Coke (*b*), is altogether different, and fully confirms the passage from Fitz. N. B., above cited. John Rolf was seised of a house in fee, and Richard Rolf was seised of a piece of land adjacent to the said house, and on this he built a new house, so nearly adjoining the house of John that the rain fell thereon from the roof of his new house. John Rolf died, and his house descended to his son, as did the new house and land to the son of Richard, who refused, upon request made to him, to remove the projecting eaves, and John, the son, accordingly brought an action against him, and upon demurrer it was held, that the action lay—because the defendant, on request, did not reform the nuisance which his father made, but suffered it to continue to the prejudice and damage of the son and heir of him to whom the wrong was done.

In Moore, 449, nom. *Beswick v. Comeden*, three exceptions are taken; 1st, That assize lay and not case. 2nd, That "custodire and manutenere" are not sufficient

words of tort. And 3rd, That a *quod permittat* lay by the statute, and not an action on the case. And it was adjudged, that the plaintiff should take nothing by his writ.

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coming to
nuisance.

In another report, nom. *Beswick v. Omuden* (c), it is said, "adjudged that the feoffee shall have an action on the case for a nuisance erected before his time and continued during his time, but only for the continuance."

In *Penruddock's case* (d), one *Clark* brought a *quod permittat* against *Penruddock* and wife, "and the case was such—*John Cock* built a house on his own freehold, so near the curtilage of *Thomas Chuckley* that it hung over three feet of the said curtilage; and afterwards *Chuckley*, to whom the nuisance was done, conveyed his house to the plaintiff, and *John Cock* conveyed his house to the defendants; and the first question was—whether the writ lies in this case for a feoffee or not;" and it was objected, "that when a wrong and injury is done by levying of a nuisance for which an action lies, that if he who has the freehold to which the nuisance is done conveys it over, now this wrong is remediless. As if the landlord encroaches on the rent of his tenant, the tenant cannot avoid this wrong in an avowry; but in an assize, or a cessavit, or a *ne injustè vexes*, he may. But if the tenant to whom the wrong is done enfeoffs another, his feoffee shall never avoid this wrong, for he shall take the land in the same plight as it was given him." And so in the case of common.

Penruddock's
case.

"But it was answered and resolved, that the dropping of the water in the time of the feoffee was a new wrong, so that the permission of the wrong by the feoffor, or

(c) Moore, 599.

(d) 5 Rep. 100 b.

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his feoffee, to continue to the prejudice of another, should be furnished by the feoffee of the house, &c., and if it be not reformed after request, a *quòd permittat* lies against the feoffee." This judgment was affirmed on a writ of error, and "so this case was adjudged by all the judges of England."

Some v. Bar-
wish.

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In *Some v. Barwish* (e), it is said, "It was also held that for a nuisance erected in the time of the devisor, and continued afterwards, (as this case was,) the devisee shall join in the action; for the continuance thereof is as the new erecting of such a nuisance."

Roswell v.
Prior.

In *Roswell v. Prior*, as reported in 12 Mod. 635, after giving the decision that an action lay for continuing a nuisance either against the lessor, or his lessee, at the plaintiff's option, there is the following dictum:—"But if this action here were brought *by* an *alienee* of the land to which the nuisance was against the erector, and the erection had been before any estate in the alienee, the question would have been greater; because the erector never did any wrong to the alienee." The reports of this case in Salkeld and Lord Raymond (f) contain no such dictum, which, at the utmost, amounts to a doubt only, and is directly at variance with the decisions in *Rolf v. Rolf* and in *Penruddock's* case.

The following authority has been frequently cited on this point:—In Com. Dig. (g) it is said, "So it does not lie for a reasonable use of my right, though it be to the annoyance of another. As if a butcher, brewer, &c., use his trade in a convenient place, though it be

(e) Cro. Jac. 231.

(g) Action upon the Case for a

(f) *Roswell v. Prior*, 2 Salk.

Nuisance (C).

460; 1 Lord Ray. 392, 713.

to the annoyance of his neighbour." No authority is cited. This appears, however, to refer rather to the amount of annoyance, requisite to give a right of action at all for a nuisance, than the right to cause one (*h*).

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coming to
nuisance.

In Viner's Abr. (*i*) it is said, "If a man build a kiln to burn chalk, to the nuisance of my house and trees next adjoining, and after discontinues the use of it, and then dies, and his heir renews the use of it again, this is a new nuisance by the heir, and a *quòd permittat* lies against him for it. But otherwise it would be, if the kiln never was discontinued in the life of the father, but had been always used, and the heir continued to use in the manner; for there no *quòd permittat* lies against him."—4 Ass. 3.

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The case itself (*h*), of which this purports to be an abstract, does not contain the last of these two positions; in addition to which it is expressly relied on in *Penruldock's case* as an authority for a *quòd permittat* lying in a case where, if the above quotation were correct, it clearly could not have been maintained. The position in Viner would no doubt be true, if sufficient time had elapsed to confer a prescriptive title on the father, and no addition had been made by the son; but of this no mention is made in the Year Book.

"Where there hath been an ancient brew-house time out of mind, although in Cheapside or Fleet Street, &c., this is not any nuisance, because it shall be supposed to have been erected when there were no buildings near. Contrà—If a brew-house should be now erected in any of the streets or trading places, this shall

Brewery case.

[(*h*) See the judgment of *Martin, B.*, in *Stockport Waterworks Company v. Potter*, 7 H. & N.

160.]

(*i*) Nuisance (L).

(*h*) Vide ante, 489.

Doctrine of
coming to
nuisance.

Brewery case.

be a nuisance, and an action on the case lies for whomsoever shall receive any damage thereby; and accordingly in an action brought by one *Robins*, a laceman, in Bedford Street, against a brewer, for a nuisance from the brew-house to the goods in his shop, (it being a brew-house of *ten years' standing*,) the jury gave, for two years' damages, 60*l*." The obvious inference from which is, that the laceman's shop had only been open during the two years for which the damages were given (*l*).

Elliotson v.
Feetham.

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In the recent case of *Elliotson v. Feetham and another* (*m*), the declaration complained of a nuisance to the plaintiff's dwelling-house, from certain workshops and a manufactory for the working of iron belonging to the defendants. The defendants pleaded, "That they were possessed of their said workshops and manufactory in the declaration mentioned long, to wit, for the space of ten years, before the plaintiff became possessed of his said term of and in the said messuage or dwelling-house, with the appurtenances, in the declaration mentioned; and that the defendants always from the time at which they so became possessed of their said workshops and manufactory, down to and until the plaintiff so became possessed of his messuage or dwelling-house with the appurtenances, as aforesaid, used, exercised, and carried on the said trade and business of ironmongers, and worked iron, and made and manufactured ironmongery goods in their said workshops and manufactory, without any let, suit, interruption, molestation, or complaint by or on the part of the owners or occupiers of the said messuage or dwelling-house now of the plaintiff: and

(*l*) *Viner, Abr. Nuisance, G.*
pl. 18.

(*m*) 2 Bing. N. C. 134; S. C. 2
Scott, 174.

that the defendants, from the time the plaintiff so became possessed of his said messuage or dwelling-house, hitherto, had continued to use, exercise, and carry on the said trade and business of ironmongers, and to work iron, and make and manufacture ironmongery goods in their said workshops and manufactory, in the same manner as they had always, from the time of their becoming possessed of their said workshops and manufactory, down to and until the time when the plaintiff so became possessed of his said messuage or dwelling-house, been used and accustomed to do, and without making or causing to be made in their said workshops and manufactory larger fires, or louder, heavier, more jarring, varying, or agitating, hammering, or battering sounds or noises than the defendants had during all the previous time been accustomed to do, or than were necessary and requisite to enable them to carry on their said trade and business in and upon their said workshops and premises, in the same manner as they had always theretofore been used and accustomed to do."

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*Elliotson v.
Feetham.*

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Upon demurrer to the replication, the plea, which it was attempted to support on the authority of the case of *Leeds v. Shakerly* (n), was held bad, "the court intimating, that the defendants should at least have alleged a holding of twenty years' duration." Judgment was given for the plaintiff.

In *Bliss v. Hall* (o), an action on the case was brought for a nuisance, occasioned by the defendant carrying on the business of a candle-maker. The defendant pleaded that he was possessed of the messuage in which, &c. for three years before the plaintiff became possessed of the

Bliss v. Hall.

(n) Cro. El. 751.

(o) 5 Scott, 500; 4 Bing. N. C. 183.

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nuisance.

Bliss v. Hall.

house to which, &c. and had during all that time carried on his business "in the same manner and degree, and to the same extent, and at the same hours, as at the time when" the nuisance complained of took place. Upon demurrer to this plea, the court gave judgment for the plaintiff.

[291] *Tindal*, C. J., said, "The plaintiff in his declaration complains that the defendant wrongfully carried on in messuages contiguous to the messuage of the plaintiff the trade or business of a candle-maker, &c., by means whereof divers noisome, noxious, and offensive vapours, fumes, smells, and stenchcs, issued from the defendant's messuages, and diffused themselves through and about the plaintiff's messuage, thereby corrupting the air, and making the plaintiff's dwelling offensive and unwholesome, &c."

"The defendant, in answer, says, that he was possessed of his messuages for the space of three years next before the plaintiff became possessed of his messuage, and that he had, during all that time, carried on the trade of a candle-maker there, to the same extent and in the same manner as at the time complained of. That plea appears to me to afford no answer whatever in point of law to the charge in the declaration, which unquestionably is a nuisance. It may be that the defendant was the first occupier; but the plaintiff came to his house clothed with all the rights appurtenant to it, one of which at common law is a right to wholesome and untainted air, unless the business which creates the nuisance has been carried on there for so great a length of time, that the law will presume a grant from his neighbours in favour of the party who causes it. *Elliotson v. Feetham* decided the point."

Park, J., cited *Penruddock's case* (*p*), and observed, "*Elliotson v. Feetham* is identical with the present case. As the Lord Chief Justice there observed, 'when a man takes a house he takes it with all the rights incident to it;' so here, even in the case supposed by the defendant's counsel, the plaintiff would have had a right to that of the deprivation of which he complains. Twenty years' user would legalize the nuisance, but here the defendant only alleges a user of three years."

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Vaughan, J., concurred. "An offensive trade," said the learned judge, "may be a nuisance or not, according to the place in which it is carried on. Here the manufactory complained of is not shown to have been remote from human habitations. There is nothing upon the face of the plea to show that the nuisance is hallowed by prescription." And Mr. Justice *Bosanquet* added, "It clearly is not enough in such a case as this for the defendant to show a short possession and exercise of the offensive trade anterior to the commencement of the plaintiff's possession. Nothing less than a twenty years' user will afford a defence."

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The right of sending on the neighbouring land air impregnated with smoke, to such an extent as to be a nuisance, was recognized as a servitude by the civil law in the same manner as the right of throwing water used in manufactories, or otherwise, upon the adjacent land (*q*),

(*p*) 5 Rep. 100 b; *supra*, p. 495.

(*q*) Non putare se, ex tabernâ caseariâ fumum in superiora ædificia jure immitti posse, nisi ei rei servitutem talem admittit. Idem.

que ait, et ex superiore in inferiora non aquam, non quid aliud immitti licet. In suo enim alii hactenus facere licet, quatenus nihil in alienum immittat; fumi autem, sicut aquæ, esse immissionem;

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though no such servitude existed where the right was claimed to such an extent only as was necessary for the ordinary purposes of domestic life (*r*).

Instances of
nuisances.

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It is by no means easy to define in general terms what precise amount of infringement of the general rights of property is requisite to confer a right of action. There "must, at all events, be some sensible diminution of these rights affecting the value or convenience of the property;" and though certain trades have been declared to be nuisances when carried on in particular situations, yet it appears to be in every instance a question of fact whether such a degree of annoyance exists as can be said to amount to a nuisance (*s*).*

posse igitur superiorem cum inferiore agere, "jus illi non esse id ita facere."—L. 8, § 5, ff. si serv. vind.

Ergo per contrarium agi poterit, "jus esse fumum immittere." Sed et interdictum "uti possidetis" poterit locum habere, si quis prohibeatur, qualiter velit suo uti.—Ibid. § 5.

Nam et in balineis (inquit) vaporibus cum Quintilla cuciculum pergentem in Ursi Julii instruxisset, placuit, potuisse tales servitutes imponi.—Ibid. § 7.

(*r*) Apud Pomponium dubitatur an quis possit ita agere, "licere fumum non gravem, putâ ex foco,

in suo facere," aut "non licere." Et ait magis non posse agi: sicut agi non potest, "jus esse in suo ignem facere, aut sedere, aut lavere."—Ibid. § 6.

[(*s*) "Lex non favet delicatorem votis." The question in each case is, according to *Knight Bruce*, V.-C., in the case of *Walter v. Selfe*, 4 De Gex & Smale, 315 (affirmed on appeal), "whether the inconvenience ought to be considered as one of mere delicacy or fastidiousness, or as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or

* "I consider it to be established by numerous decisions that smoke, unaccompanied with noise or noxious vapours, that noise alone, that offensive vapours alone, although not injurious to health, may seve-

The fact that a private nuisance may also be indictable as a nuisance to the public, does not prevent any individual from bringing an action against the party causing it, provided he can prove that he has himself sustained some special injury thereby (*t*).

Instances of nuisances.

A question of fact, whether injury complained of amounts to a nuisance.

The oldest reported case of a nuisance caused by carrying on an offensive trade is in 4 Ass. 3, already mentioned, for erecting a lime-kiln.

“A tan-house is necessary, for all men wear shoes, and nevertheless it may be pulled down, if it be erected to the nuisance of another: in like manner of a glass-house, and they ought to be erected in places convenient for them” (*u*). “The erecting a common or private brew-house is not of itself a nuisance, nor the burning of sea-coal in it; but if it is erected so near the house of another that his goods are thereby spoilt, and his

Tan-house.

Glass-house.

Brewery.

dainty modes and habits of living, but according to the plain, sober and simple notions among English people;” in other words, “will the proceeding abridge and diminish seriously and materially the ordinary comfort of existence to the occupiers, whatever their rank or station, or whatever their state of health may be?”]

(*t*) *Chichester v. Lethbridge*, Willes, 73; *Crowder v. Tinkler*, 19 Ves. 621. [That private injury, arising from a public nuisance,

is the subject-matter of an action for damages, is a doctrine as old as any in the common law: per Cur. in *Hardcastle v. South Yorkshire, &c. Railway Company*, ante, 467; and see the judgment of *Kindersley*, V.-C., in *Soltau v. De Held*, 2 Simons, N. S. 133, in which case the nuisance complained of was loud noise of bells.

(*u*) Per *Hide*, C. J., in *Jones v. Powell*, Palmer, 539.

rally constitute a nuisance to the owner of neighbouring property, and that this court will restrain the continuance of the nuisance by injunction, in all cases where substantial damages could be recovered at law.” “The real question in all the cases is a question of fact, whether the annoyance is such as materially to interfere with the ordinary comfort of human existence.” (*Crump v. Lambert*, L. R., 3 Eq. 408; 17 L. T., N. S. 133.)

<u>Instances of nuisances.</u>	house made uninhabitable by the smoke, an action lies" (<i>x</i>).
Smelting-house.	In 1 Roll. Abr. (<i>y</i>) are given instances of nuisances, by a man keeping stinking tallow and greaves, the stench whereof drove away the guests from the plaintiff's house; and erecting a smelting-house adjoining plaintiff's field, whereby the grass was withered and his horses and cows killed.
Lime-pit. Pig-sty.	In 2 Roll. Abr. (<i>z</i>) the instances given of trades which are nuisances at law, are:—A glover making a lime-pit so as to corrupt a water-course; a man levying a pig-sty so near a house that by reason of the smell the owner cannot live therein; the erecting a lime-kiln; and "a dyer erecting a dye-house so near to my house that I cannot dwell therein, <i>pur le feter del fume et auter sordides</i> ."
Dye-house.	In <i>Aldred's case</i> (<i>a</i>), the declaration stated, that, by reason of the stench from the defendant's pig-sties, "the plaintiff and his servants could not remain in his house for fear of infection."
Soap-boilery.	In <i>Rex v. Pierce</i> (<i>b</i>), an information was brought against the defendant, by the Recorder of London, for erecting and continuing a soap-boilery in Wood Street. It was held by <i>Jefferies</i> , C. J., "That, though such a trade is honest, and may be lawfully used, yet, if by its stench it be an annoyance to the neighbours, it is a nuisance." A case is also mentioned of a "calender-man in London, in Bread Street, who was convicted before Lord <i>Hale</i> on such an information; for that the noise of his trade disturbed the neighbours and shook
(x) Agreed per Cur. Ibid. 18. (y) P. 88, Action on the Case, (z) 9 Rep. 57 b. pl. 6, 7. (b) 35 Car. 2; 2 Shower, 327, (z) Nusans, 141, pl. 13, 14, 15, Case 329.	

the adjacent houses:" and another case of a brew-house on Ludgate-Hill, *Rex v. Jordan*, where defendant was compelled "to prostrate the same and convert it to other purposes; for that such trades ought not to be in the principal parts of the city, but in the outskirts."

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A case is cited in *Jones v. Powell (c)*, of an action brought against a dyer, "Quia fumos, foedidates, et alia sordida juxta parietes querentis posuit, per quod parietes putridæ devenerunt, et ob metum infectionis per horridum vaporem, &c., *ibid.* morari non audebat."

In *Jones v. Powell*, a brew-house in which sea-coal was burnt, was held to be a nuisance.

In *Baines v. Baker (d)*, Lord *Hardwicke* refused to grant an injunction to stay the building of a small-pox hospital, in Cold Bath Fields, very near the houses of several of the plaintiff's tenants; though it appeared that in the lease of the house in question, granted by the plaintiff to the defendant, there was a covenant against turning it into a brew-house, because it would be a nuisance. The Lord Chancellor said, "I am of opinion it is a charity likely to prove of great advantage to mankind. Such an hospital must not be far from a town, because those that are attacked with that disorder, in a natural way, may not be carried far."*

(c) Hutton, 136.

(d) Ambler, 158. 3 Atk. 750 (1752).

* If a man divides a house in a town for poor people to inhabit, which will make it more dangerous in times of infection of the plague, it is a common nuisance. P. 10 Car. B. R. An indictment against Browne for dividing a house in the town of Hertford was held good, and he was put to plead to it, and then said that such indictments were frequent in London for dividing houses. (2 Rol. Abr. 139, Nusans, F. pl. 3; 16 Vin. Abr. 23, Nusance; 1 Hawk. P. C. 694, Curwood's edit.) In 1767 Sutton was indicted for keeping a house near

Danger of
infection.

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nuisances.

[In the last-cited case there was, in fact, no nuisance at all; see ante, 502, n. (s), and the comments of *Kindersley*, V.-C., in *Soltau v. De Held*.]

“So, an action doth not lie for a reasonable use of my right, though it be to the annoyance of another: as if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbour” (e).*

(e) Com. Dig. Action on the Case for a Nuisance (C): no authority cited.

Epsom for inoculating for the small-pox. The court refused to quash it on motion, saying, “You must demur.” (*Rex v. Sutton*, 4 Bur. 2116.) Vantandillo was indicted, convicted and sentenced to three months’ imprisonment for unlawfully and injuriously carrying a child infected with small-pox along a public highway in which persons were passing, and near to the habitations of the king’s subjects. (*Rex v. Vantandillo*, 4 M. & S. 73.) Gunter, having sold some land to the Metropolitan Asylum Board and covenanted to make a road, objected to do so when he found that they were going to erect a small-pox hospital, on the ground that it was a fraud on the contract. *Wickens*, V.-C., assuming in the defendant’s favour that the hospital was a nuisance, would not allow the plea. (*Metropolitan Asylum Board v. Gunter*, 6 W. N. 128.)

* The authority for the passage in Com. Dig. is probably 2 Rol. Ab. 139, Nusans, F. pl. 2. “If a man makes candles in a vill, by which he causes a noisome smell to the inhabitants, still this is no nuisance, for the needfulness of them shall dispense with the noisomeness of the smell. 3 Jac. B. R. *Rankett’s* case adjudged.” (Vin. Abr. Nuisance, F. pl. 2.) *Hawkins* questions the reasonableness of this opinion. (P. C. bk. 1, c. 32, s. 10, vol. 1, 694, Curwood’s edit.) Or he may refer to Anon. (1 Vent. 26.) “It was said that a man ought not to be punished for the erecting of anything necessary to his lawful trade, but it was answered that this ought to be in a *convenient place where it may not be a nuisance*. For *Trisden* said he had known of an injunction for erecting of a brew-house near Serjeants’ Inn; but the other justices doubted and agreed that it was unlawful only to erect such things near the King’s palace.” The places where trade could be carried on in towns appear formerly to have been regulated by bye-law. In a *Habens Corpus* the case was thus,—a man would erect a tavern in Birchin Lane, and the mayor and commonalty for his disobedience, because he would not obey them, but would erect a tavern there against their wills, he

It would be an endless task to enumerate all the instances of nuisance for which an action may be maintained. It may be sufficient to observe, that the erection of anything offensive, so near the house of another as to render it useless and unfit for habitation, e. g. the erection of a swine-sty, lime-kiln, privy, smith's forge, tobacco-mill, tallow-furnace, near a common inn, or the like, is actionable (*f*).*

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(*f*) Sel. N. P. 12th edit. 1129; *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Bliss v. Hall*, 5 Scott, 500; 4 Bing. N. C. 183; [Burn's Just. tit. Nuisance, 1; and see as to bell-ringing, *Soltan v. De Held*, 2 Sim., N. S. 233.

In *Walter v. Selfe*, 4 De Gex & Smale, 315, the defendant commenced burning bricks within 100 yards of the plaintiff's house, and the court restrained him by injunction, it being proved that the brick burning materially interfered

with the comfort of existence. See ante, p. 502, note (*s*).

This decision was affirmed on appeal, and the judgment of *Knight Bruce*, V.-C., is quoted by *Kindersley*, V.-C. in *Soltan v. De Held*, 2 Simons, N. S. 133, as a correct statement of the law.

The defendants in *Walter v. Selfe* were satisfied to abide by the opinion of the Court of Chancery upon the point of law; and, according to the authority of that case, the law is, that a man has no

knowing the same to be an unfit place, did imprison him, and the opinion of the court was that he should be remanded, because that the mayor and commonalty had authority over him, and they might appoint him a place in which he might erect his tavern, for it is a disorderly profession, and not fit for every place; and it was adjudged in this court that a brew-house ought not to be erected in Fleet Street because it is in the heart of the city, and would be annoyance to it, and if one should set up a butcher's shop or a tallow-chandler's shop in Cheapside, it ought not to be, for the great annoyance that would ensue. (March, 15, pl. 34, E. 15 Car.) And in *Player v. Jenkins* (1 Sid. 284, B. R. P. 18 Car. 2), the court say the corporation may impose restraints as to the place of trade, as that a butcher shall not have a shop in Cheapside. (Vin. Abr. Bye-laws, B. pl. 16.)

* In an indictment against a vitriol manufacturer for impregnating the air with noisome and offensive stinks and smells, Lord *Mansfield* said, "It is not necessary that the smell should be unwholesome; it is enough if it makes the enjoyment of life and property uncomfortable." (*R. v. White*, 1 Bur. 337.)

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right, by brick-burning or other means, to cause noxious vapours to pass on to his neighbour's land, to such an extent as substantially to interfere with the ordinary comfort of existence; but in a subsequent case of *Hole v. Barlow*, 4 C. B., N. S. 334, it appears to have been laid down by the judges in the Court of Common Pleas, that such right does in some cases exist.

In the case last mentioned the defendant burnt bricks within a short distance of the plaintiff's house. The learned judge, at the trial of an action for the nuisance thereby occasioned, left to the jury the questions, first, was the place where the bricks were burnt a proper and convenient place for the purpose, and, IF NOT, was the nuisance such as to make the enjoyment of life and property uncomfortable, and the jury found for the defendant; and in discharging a rule for a new trial on the ground of misdirection, *Chandler, J.*, said that the direction was *consistent with all the authorities*, and the court would be in effect overruling several if they were to make the rule absolute.

No authorities were cited by the court except the passage from Comyns above mentioned; but it may be observed that the direction is opposed to the opinions expressed by the judges in *Bliss v. Hall* and *Elliotson v. Fetham*, in both of which it is laid down by the court, that twenty years' user is required in order to deprive a neighbour of his remedy for the

nuisance caused by carrying on an offensive trade, and no trace of the doctrine is to be found in them, that no user is required if the place be a "proper and convenient" one.

No reference was made by the court to the case of *Walter v. Selfe*, nor to the judgments in the two other cases already referred to, and it cannot be disputed that a direct conflict of opinion exists upon the question, whether a man has a right to cause noxious matters to flow on to his neighbour's land to such an extent as to render the enjoyment of life and property substantially uncomfortable, in any case except that in which an easement has been acquired entitling him to do so.

From the report of *Hole v. Barlow*, it does not appear upon which of the questions left to them the jury found their verdict; but, although from the judgments delivered in that case, it appears that the judges were not of opinion that this was material, the effect of the actual decision is quite altered by the fact mentioned by *Martin, B.*, in his judgment in *Stockport Waterworks Company v. Potter*, 7 II. & N. 160, namely, that the jury in fact found that there was no nuisance. The real effect of the placitum in Comyns' Digest, already cited, p. 506, is shown in the interpretation of the word "convenient," adopted by *Hide, C. J.*, in *Palmer's Rep.* 539, and *Martin, B.*, in *Stockport Waterworks Company v. Potter* ubi sup., according to which "con-

venient place" means a place where a nuisance will not be caused to another; and the authorities in which the locality has been spoken of as material in determining the question of nuisance or no nuisance are perfectly consistent with this interpretation. Upon the question of fact, whether a nuisance has been caused by the defendant at all, the nature of the locality, like every other fact in the case, must be taken into consideration; but that question

really is, whether the act of the defendant renders the enjoyment of life and property by the plaintiffs uncomfortable, and if this be found in the affirmative, it should seem conclusive of the right to recover whatever the locality; and the great inconvenience and insecurity which would result if this were not so are obvious. See also the judgment of *Wood*, V.-C., in *A. (t. v. Birmingham, & Co.*, 4 K. & J. 528.]*

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* In *Beardmore v. Treadwell* (9 Jur., N. S. 272, 3 Giff. 683), *Beardmore v. Stuart*, V.-C., granted an injunction against brick-burning. He said, *Treadwell*. "Where a man is injuring his neighbour to a very material extent in a way not absolutely necessary, this court is always disposed to interfere. In such cases the balance of convenience must be attended to. Upon the result of the evidence it is proved that there has been an actual and positive injury to the plaintiff, and that the comfort and enjoyment of her mansion have been disturbed; that the ornamental trees planted to exclude the appearance of unsightly objects have in some cases been destroyed, and in many cases injured." As to the ruling of *Byles*, J., in *Hole v. Barlow*, "that no action lies for the reasonable use of a lawful trade in a convenient and proper place," he observes, "in this exposition of the law, the words 'convenient and proper' must be taken subject to some qualification; nobody will doubt that to the brick-burner the place may be convenient, and probably the most convenient place that can be found, but it is clear that the place being convenient to one party is not enough to justify the continuance of the acts if they make the enjoyment of life and property uncomfortable to the other, especially if they can be done elsewhere without these injurious consequences following. The words, therefore, 'convenient and proper' must be used with reference to the situation of both parties."

In *Bamford v. Turnley* (3 B. & S. 62), another brick-burning case, *Bamford v. Cockburn*, C. J., on the authority of *Hole v. Barlow*, directed the jury *Turnley*. that if they thought the spot was convenient and proper, and the burning of the bricks was under the circumstances a reasonable use by the defendant of his own land, the defendant would be entitled to a verdict, independent of the small matter of whether there was an interference with the plaintiff's comfort thereby, and a verdict was entered for the defendant. On appeal to the Exchequer Chamber, the direction was

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held to be improper, the verdict was set aside, and a verdict entered for the plaintiff, for 40s. The majority of the court (*Erle, C. J., Williams and Keating, JJ., and Wilde, B.*), held, that *Hole v. Barlow* was not well decided, and that the words "convenient place," in the passage in Com. Dig., meant a place where a nuisance would not be caused to another, in conformity with the observations of Mr. Willes in the above note, and that the law was, that a man might, without being liable to an action, exercise a lawful trade, as that of a butcher or brewer, or the like, notwithstanding it was carried on so near the house of another as to be an annoyance to him, in rendering his residence there less delectable or agreeable, provided the trade be so conducted that it did not cause what amounted in point of law to a nuisance to the neighbouring house. *Pollock, C. B.*, dissented from the judgment. The parties afterwards agreed to enter a *stet processus*.

***Carey v. Led-
bitter.***

In *Carey v. Ledbitter* (13 C. B. N. S. 170), *Wightman, J.*, refused to leave to the jury the question whether the place where the defendant burned the bricks was a convenient and proper place for the purpose, but left it to them to say whether the acts of the defendant rendered the plaintiff's residence substantially uncomfortable, and whether his shrubs, &c. had been thereby injured. The plaintiff obtained a verdict for 20*l*. The court held the judge's direction correct. *Erle, C. J.*, said that the court in *Bamford v. Turnley* only decided that the form of question adopted in *Hole v. Barlow* was wrong. He observed, that the affairs of life in a dense neighbourhood could not be carried on without mutual sacrifices of comfort, and in all actions for discomfort the law must regard the principle of mutual adjustment; and the notion, that the degree of discomfort which might sustain an action under some circumstances must therefore do so under all circumstances, was as untenable as the notion, that if the act complained of was done in a convenient time and place, it must therefore be justified, whatever the degree of annoyance that was occasioned thereby, and that the judgment of *Willes, J.*, in *Hole v. Barlow* appeared to him to be sound.

***Tipping v.
St. Helen's
Smelting
Company.***

In *Tipping v. St. Helen's Smelting Company* (4 B. & S. 608), an action for a nuisance by noxious fumes from a smelting-house, *Mellor, J.*, directed the jury that every man is bound to use his own property in such a manner as not to injure the property of his neighbour, unless he has acquired a prescriptive right to do so. But that the law does not regard trifling inconveniences; everything must be looked at from a reasonable point of view, and therefore in an action of nuisance to property from noxious vapours, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. In determining that question, time, locality, and all the circumstances, must be taken into consideration. In places where great works had been erected and carried on, which were the means of

Instances of
nuisances.

developing the national wealth, persons must not stand on extreme rights and bring actions in respect of every matter of annoyance, as, if that were so, business could not be carried on in such places. The defendant complained of the direction, but the Courts of Queen's Bench and Exchequer Chamber held it to be correct; and *Cockburn*, C. J., said that it was not a right question to put to the jury to say whether the place where the act was done was a proper and convenient one for the purpose, or whether the doing of it in that place was a reasonable use of the defendant's land, and that it was inconsistent with sound reason to say that the matter could be considered with reference to the interest of the public. Without compensation, an individual was not precluded from redress for private injury on account of a benefit to the public arising from that injury. The judgment was affirmed by the House of Lords (11 H. Lds. 642, *St. Helen's Smelting Company v. Tipping*).

It is no answer to a claim for an injunction against a nuisance for fouling water that the water is already fouled by others, who have right to do so. "The circumstance of the plaintiff buying up these rights (he had bought up some but not all) indicates the soundness of the rule of law which has been laid down in the House of Lords in the case of *St. Helen's Smelting Company v. Tipping* (11 H. Lds. 642), namely, that you cannot justify an additional nuisance in the case of smoke, if it can be clearly traced to your new chimney, on the ground that the plaintiff has had a great many nuisances to encounter before. If the nuisances which he has had to encounter before have been such that it is impossible to trace any evil to the work you are conducting with your new chimney, possibly the case may be otherwise; though even then it must be seen how unreasonable it would be to allow such an excuse, because the circumstance that a person who is so injured can buy up those who have acquired rights against him is no reason why he should be compelled to submit to your additional nuisance until he has bought up all the rest." (*Crossley v. Lightowler*, L. R., 3 Eq. 289, per Wood, V.-C.; 2 Ch. Ap. 478. See also *Crumphall v. Lambart*, L. R., 3 Eq. 409; 17 L. T., N. S. 133.)

In *Roskell v. Whitworth* (6 W. N. 66, 89), an injunction was granted against an excessive noise and vibration caused by a steam hammer, to the nuisance and injury of a church and schools, and which had also caused structural damage to the church and the organ.

In *Ball v. Ray* (L. R., 8 Ch. 467), the plaintiff occupied a house in Green Street, Grosvenor Square, as a private hotel. The defendant used the ground floor of the adjoining house as a stable. The noises caused by his horses were an annoyance to the plaintiff and his lodgers, and his lodgers left in consequence. An injunction was granted because the defendant had turned his house to an unusual purpose, in such a

*Crossley v.
Lightowler.*

Noise and
vibration.

*Roskell v.
Whitworth.*

Ball v. Ray.

Instances of
nuisances.

Noise and
vibration.

manner as to do substantial injury to his neighbour. Lord *Selborne*, C., observed that if houses are so built that, from the commencement of their existence, it is manifest that each inhabitant was intended to enjoy his own property for the ordinary purposes for which it, and all the different parts of it, were constructed, then, so long as it is so used, there is nothing which can be regarded at law as a nuisance, or which the other party has a right to prevent; and *Mellish*, L. J., said the case was not like the noise of a pianoforte in a neighbour's house, or the noise of children in a nursery, which are noises we may reasonably expect, and must to a considerable extent put up with.

Beaumont v.
Emery.

In *Beaumont v. Emery* (10 W. N. 44, 106), an injunction was granted at the suit of a grocer, who had been driven from his house by the constant noise and vibration caused by a steam engine used by his neighbour in the business of a cooper.

Gaunt v.
Fynney.

But in *Gaunt v. Fynney* (L. R., 8 Ch. 8), Lord *Selborne* refused an injunction against the noise and vibration of a steam engine at Leek, not being satisfied that it was, beyond fair controversy, excessive or unreasonable.

Smoke, &c.

In *Barlow v. Bailey* (6 W. N. 95), an injunction was granted where the sulphuretted hydrogen gas, which escaped from the defendant's chemical works, affected the health of persons on the plaintiff's premises, and made it almost impossible for them to continue their occupations.

Barlow v.
Bailey.

Salvin v.
North Brance-
peth Coal
Company.

Salvin v. North Brancepeth Coal Company (L. R., 9 Ch. 705) followed the decision in *St. Helen's Smelting Company v. Tipping*, and an injunction was refused to stop the working of a colliery, because it was not shown that it had caused the plaintiff visible and substantial damage. *James*, L. J., says that "If resort is had to the microscope of the naturalist or the test of the chemist to establish damage, it is not sufficient; the damage must be such as can be shown by a plain witness to a plain common jurymen."

CHAPTER VII.

PARTY WALLS AND FENCES.

ALTHOUGH, strictly speaking, the rights and liabilities of the owners of property adjoining to a party-wall relate principally to the doctrine of tenancy in common, yet some of the rights exercised over it partake of the character of easements.

Party-walls
presumed to be
in common.

The common user of a wall adjoining lands belonging to different owners is *primâ facie* evidence that the wall and the land on which it stands belong to the owners of those adjoining lands in equal moieties, as tenants in common (*a*).

Where the precise extent of land originally belonging to each owner can be ascertained, the presumption of a tenancy in common does not arise, but each party is the owner of so much of the wall as stands upon his own land (*b*).*

Presumption
rebutted.

(*a*) *Cubitt v. Porter*, 8 B. & C. 257, and note, p. 259; *Wiltshire v. Sidford*, 1 M. & Ry. 404. (*b*) *Matts v. Hawkins*, 5 Taunt. 20.

* Where the plaintiff claimed the whole wall as abutting on the workshop and building of the defendant, and the jury found that it was a party-wall half on the land of each, judgment was given for the defendant, because the plaintiff should have described his half of the wall as abutting on the defendant's half. (*Murly v. M'Dermott*, 8 A. & E. 138.) Where there is an easement of support in a party-wall, the owner of the dominant tenement is entitled to put any amount of weight on the wall which does not endanger its stability. (*Sheffield Industrial Society v. Jarvis*, 6 W. N. 208; 7 W. N. 47.) He cannot

Presumption
rebutted.

In the latter case, there seems no authority for saying that the rights of the respective owners of the portions of the wall differ from those of the proprietors of any other two walls which abut on each other: unless prevented by some easement having been acquired, either party would be at liberty to pare away or even entirely to remove his portion, notwithstanding the other half might be unable to stand without the support of it (c). At the utmost, the fact of the close union of the walls could only impose a duty of greater caution than might otherwise be required in removing the materials. "If," said *Bayley, J.*, "the wall stood partly on one man's land and partly on another's, either party would have a right to pare away the wall on his side, so as to weaken the wall on the other, and to produce a destruction of that which ought to be the common property of the two" (d).

(c) 8 B. & C. 261.

v. *Christ's Hospital*, judgment of

(d) *Cubitt v. Porter*, 8 B. & C.

Tindal, C. J., 4 M. & G. 761.

257. See on this point, *Bradbee*

take from it a pilaster and girder erected for the benefit of the adjoining house. (*Thrupp v. Scruton*, 7 W. N. 60.) Where the lower part of a wall forms the separation and support of the two buildings abutting on it, one being the higher, and the higher part of the wall has windows in it, the lower portion only is a party-wall, and the higher the external wall of the higher house; and if the houses are pulled down and rebuilt, a Building Act prohibiting windows in party-walls does not prevent the windows from being restored. (*Weston v. Arnold*, L. R., 8 Ch. 1084.) Where a man builds two houses, the pillar and portico of one overlapping the other, and sells the first, the pillar and portico pass as part of the house sold. (*Fox v. Clarke*, L. R., 7 Q. B. 748; 9 Q. B. 565.) It may be inferred from these cases that where two houses belonging to the same owner are divided by a party-wall (this is the origin of most, if not all party-walls), and one is sold, half the party-wall passes as part of the house, with an easement of support on the other half, and that an easement of support for the house retained on the half of the wall conveyed is by implication granted by the purchaser to the vendor.

In general, however, party-walls will be found “to be built on the common property of the two, and to be the common property of both;” and, in the absence of any further proof than that which is afforded by evidence of a common user, such will be presumed to be the case. (*e*).

Presumption rebutted.

In the Metropolis, party-walls are regulated by the provisions of the Building Act, stat. 18 & 19 Vict. c. 122 (*f*).

Building Act.

The only general obligation with respect to fences imposed by the common law is, that every proprietor of land should prevent, by fences or other means, his cattle from trespassing on the land of his neighbours (*g*).*

Obligation to keep in cattle.

[(*e*) And, as in the case of any other tenement held in common, each tenant is liable to an action if he ousts his co-tenant from the use of it. See *Stedman v. Smith*, 8 El. & Bl. 1, for what is evidence of ouster in such a case.]

[(*f*) In the case of banks, &c. separating fields, the ownership is thus determined:—If two fields are separated by a ditch and bank, the bank, *prima facie* and in the absence of proof to the contrary, is presumed to belong to the owner of the field in which the ditch is not; but if there be a bank with

ditches at each side of it, then there is no presumption as to the ownership of the bank, and the question must be determined by acts of ownership. *Bayley, J.*, in *Guy v. West*, cited in 2 Selwyn, N. P. 1297, 12th edit. See the explanation of this given by *Lawrence, J.*, in *Towles v. Mellor*, 3 Taunt. 137-8.]†

[(*g*) Dyer, 372 b; 1 Wms. Saunders, 322 a; 1 Notes to Saund. 559; and see the Year Book, 20 Edw. 4, 10, as to duty of commoners.]

* The same law that governs the obligation between adjoining landowners applies where one is landlord to the other. He is under no obligation to keep up a fence on his land to prevent his tenant's cattle from straying. (*Erskine v. Adeane*, L. R., 8 Ch. 756, 762.)

† And by *Holroyd, J.*, *Doe d. Pring v. Pearsy*, 7 B. & C. 307. In the case of a lane between two closes used as a way, the presumption is that the soil *ad medium filum viæ* belongs to the owner of the land on each side, the same as in the case of a highway, that is, if the

Spurious easement, to repair.

There may, however, be a spurious kind of easement obliging an owner of land to keep his fences in a state of repair, not only sufficiently to restrain his own cattle within bounds, but also those of his neighbours (*h*); and rendering him liable for any injury which his neighbour's cattle may sustain in consequence of the non-repair of the fences, which, unless an easement had been acquired, he clearly would not be. This liability is, however, confined to the cattle of his neighbour, or such as are rightfully on the adjoining land, and does not extend to all cattle whatsoever, though they may have entered through the land of the party towards whom this obligation to keep the fences in repair legally exists (*i*). "If the cattle of one man escape into the land of another, it is not any excuse that the fences were out of repair, if the cattle were trespassers on

(*h*) Per *Bayley, J.*, in *Boyle v. Tamlyn*, 6 B. & C. 337—339, *Star v. Rookesby*, 1 Salk. 335; [where the nature of the evidence sufficient to establish such a liability is discussed. Lord *Tenterden's* Act does not apply to such cases.]

[(*i*) See the judgment of *Parsons, C. J.*, in *Rust v. Low*, 6 Mass. 90, in which the same view of the law is taken, and the whole question and the authorities upon it examined and explained.

The like rule applies in the case of the liability to maintain fences thrown upon railway com-

panies by the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 68. *Ricketts v. East and West India Docks, &c. Railway Company*, 12 C. B. 160; *Manchester, Sheffield and Lincolnshire Railway Company v. Wallis*, 14 C. B. 213. In some cases, as in *Fancett v. York and N. M. Railway Company*, 16 Q. B. 610, particular statutes impose on railway companies a duty of keeping parts of the line guarded against all persons and cattle on the adjacent land, whether lawfully there or not; but the general liability is as above stated.]

user has been as a road, and not in the exercise of a claim of ownership. (*Holmes v. Bellingham*, 7 C. B., N. S. 329; *Smith v. Howden*, 11 C. B., N. S. 398.)

the close from whence they come." Per *Heath, J.*, in *Dovaston v. Payne* (*k*). Spurious easement, to repair.

In an anonymous case reported in *Ventris* (*l*), the plaintiffs declared that the defendants were bound to maintain a certain fence, and that, by reason of their neglect to do so, a mare of the plaintiff's escaped through the fence, and was drowned in a ditch. After verdict for the plaintiff, on motion in arrest of judgment the court held, that the plaintiff was entitled to recover.

In *Rooth v. Wilson* (*m*), where a person to whom a horse had been sent turned it into a pasture, and by the defect of the fence, which the neighbouring owner was bound to repair, it fell down into the neighbouring close and was killed; the liability of the defendant for the consequences of his neglect in not repairing was not disputed, the only point made being, that the bailee could not maintain the action (*n*).*

(*k*) 2 H. Bl. 557; vide etiam per *Wilmut, C. J.*, 3 *Wilson*, 126.

(*l*) Vol. 1, p. 261.

(*m*) 1 B. & Al. 59.

(*n*) See also *Powell v. Salisbury*, 2 You. & Jer. 391. [And see *Singleton v. Williamson*, 7 H. & N. 410, in which case a man had distrained, damage feasant,

cattle which had escaped from a close through defect of a fence which he himself ought to have repaired, and had ultimately strayed into his close, and the court held that he was wrong, the trespass being the natural consequence of his own neglect of duty.]

* See also *Lee v. Riley*, 18 C. B., N. S. 722.

The fact of the tenants of land enclosed by a fence always having repaired it is some evidence of an obligation to do so; and the evidence of obligation is strengthened if the land was originally enclosed from a common. When the privilege of inclosure was granted by the lord, it is unlikely that he would impose on the rest of his commoners the obligation of building and maintaining a fence, or that he would himself undertake the duty of doing so; and to make such a concession without imposing such a duty on the party benefited would be an injustice to

[The remedy in these cases is against the occupier of the land (*o*).]

[(*o*) *Cheetham v. Hampson*, 4 T. R. 318; 1 Wms. Saund. 322; 1 Notes to Saund. 559. Unity of possession would of course have the same effect in this as in the case of a regular easement, ante, p. 16; and if a man bound to re-

pair as against his neighbour were to take a lease of the latter's close and then to sublet it, the sublessee would have no remedy against his landlord for not repairing.]

Extent of obligation.

Lawrence v. Jenkins.

the commoners. (*Barber v. Whitely*, 11 Jur., N. S. 822; 34 L. J., Q. B. 212.)

The obligation is absolute to maintain at all times a sufficient fence without notice to repair, except in the case of damage by the act of God or vis major. If the fence is broken by a stranger, and the obligor has no notice of it, he is answerable for cattle escaping into the dominant close and proximately due to that cause. (*Lawrence v. Jenkins*, L. R., 8 Q. B. 274.)

**Railways
Clauses Act.**

A railway company, under the Railways Clauses Act, is bound to keep up their fence against all cattle lawfully in the adjoining land, including sheep which are folded against the fence (*Bessant v. Great Western Railway Company*, 8 C. B., N. S. 368), pigs (*Child v. Hearn*, L. R., 9 Exch. 176), cattle on the land with the permission of the occupier (*Dawson v. Midland Railway Company*, L. R., 8 Exch. 8), or which they have frightened into the adjacent land by the negligent management of their trains. (*Sneesby v. Lancashire and Yorkshire Railway Company*, L. R., 9 Q. B. 263; 1 Q. B. D. 42.) Land taken by them to form a substituted road is land taken for the use of the railway within the meaning of the act, and they are bound to fence it. (*Corbett v. Great Western Railway Company*, 7 W. N. 225.) But they are not bound to fence against a tramway belonging to themselves, which they allow the public to use on payment of tolls (*Marfeu v. South Wales Railway Company*, 8 C. B., N. S. 525), nor are they responsible to their passengers for the defect of their fences. Their obligation to them is only to take reasonable care to keep cattle off the line. (*Buxton v. North Eastern Railway Company*, L. R., 3 Q. B. 549.)

**Turnpike
trustees.**

The trustees of a turnpike road are not bound to fence a road made by them, unless there is a special provision in their act to that effect, although they have made fences and kept them in repair for many years. (*Ilex v. Llandilo*, 2 D. & E. 232.) But if their act directs fences to be made and repaired, they are the parties to make and repair, unless the burden is expressly imposed on some one else. (*Merivale v. Exeter*, L. R., 3 Q. B. 149.) 4 Geo. 4, c. 95, s. 66, enacts that "the trustees who make a road shall make proper fences." It is no

Analogous to this liability arising from neglect to do what the party was bound to do, is that incurred by a party doing some positive act, as driving or enticing into his property the animals of his neighbours, so that they sustain injury thereby. Liability for driving or enticing animals.

Thus in *Townsend v. Wathen* (*p*), where the defendant set traps baited with strong-smelling flesh so near the edge of his property, as thereby to entice the plaintiff's dogs in the neighbouring close, which were caught in the traps and wounded, it was held that the defendant was liable. Lord *Ellenborough* said, "Every man must be taken to contemplate the probable consequences of the act he does. And, therefore, when the defendant caused traps scented with the strongest meats to be placed so near to the plaintiff's house as to influence the instinct of those animals, and draw them irresistibly to their destruction, he must be considered as contemplating this probable consequence of his act. That which might be taken as general evidence of malice against all dogs coming accidentally within the sphere of the attraction which he had placed there, must surely be evidence of it against those in particular which were placed nearest to the source of attraction and within the constant influence of it. What difference is there in reason between drawing the animal into the trap by means of his instinct which he cannot resist, and putting him there by manual force?" *Townsend v. Wathen.*

(*p*) 9 East, 277.

answer for trustees who have made the road to say that they have not sufficient funds to make the fences. (*Reg. v. Luton*, 1 Q. B. 860.)

If the owner of a mine make a shaft in the surface under a licence to do so, and thereby create danger to the cattle of the owner of the surface, he is bound to fence the shaft. (*In re Williams & Groucott*, 4 B. & S. 119.)

Liability for
damage to per-
sons or cattle
trespassing.

Where, however, no such obligation to repair exists, it seems, though there are authorities throwing doubt on the point, that the owner of the land is not liable for injury sustained by cattle which are trespassing upon his property.

[300] “If A., seised of a waste adjoining a highway, dig a pit in the waste within thirty-six feet of the said way, and the mare of B. escape into the said waste, and fall into the said pit, and there die, still B. shall not have any action against A., for that the making of the pit in the waste and not in the highway, was not any tort to B., but that it was by the default of B. himself that his mare escaped into the waste” (q).

*Sarch v.
Blackburn*

So, in *Sarch v. Blackburn* (r), an action was brought “for knowingly keeping a ferocious dog accustomed to bite mankind, and which bit the plaintiff.” The plaintiff was a watchman of the parish, and was bitten as he was going in the middle of the day to the defendant’s

(q) *Blythe v. Topham*, 1 Rolle’s Abr. 88, Action on Case, N., Nusans, pl. 4; S. C. Cro. Jac. 158; see also *Brook v. Copeland*, 1 Esp. 203. [In accordance with the principle of this case is *Hardcastle v. South Yorkshire Railway Company*, 4 H. & N. 67; and it is also recognized in *Barnes v. Ward*, 9 C. B. 392, which shows that where the excavation immediately adjoins the footway, so as to amount to a nuisance, the owner would be liable; and in *Hounsell v. Smyth*, 7 C. B., N. S. 731, where it was held, that the owner of uninclosed land, over which the public are permitted by him to ramble without interference, is not bound to fence excavations in it,

as every one using land under such circumstances must take the permission with its concomitant peril. It would be otherwise, however, in case of a man holding out any direct inducement or invitation to another to go by a path across his land; for in such a case he would be bound either to warn or guard the other against dangerous obstructions or pitfalls placed or continued by him in the path. See the cases cited ante, p. 447, n. (i). See also the Highway Act, 5 & 6 Will. 4, c. 50, s. 70, as to excavations near highways within the act.]

(r) *Moo. & Mal.* 505; 4 C. & P. 297, S. C.

house by a back way, which the defendant contended was a private way for himself and family only.

Liability for
damage to per-
sons or cattle
trespassing.

The plaintiff was alone at the time, and there was no evidence of the reason of his being in the place where he was bitten. There was a notice, "Beware of the dog," but the plaintiff could not read.

*Sarch v.
Blackburn.*

Tindal, C. J., left it to the jury to say on which side there was negligence. "If the plaintiff was negligent, if he was where he ought not to have been, or if he neglected means of notice, he cannot recover; if the defendant placed the dog where he might injure persons, not themselves in fault, he is responsible.

"The plaintiff certainly is not entitled to recover in this action, if he was injured by his own fault. There is no evidence to show why the plaintiff was on the spot in question, whether with a lawful or unlawful object. The law, however, would rather presume a lawful object; and there is no improbability in his having one, for he was on one of the ways to the house itself at mid-day, although certainly it was not the most public and usual way. If he was lawfully there, I do not think the mere fact of the defendant's having put up the notice relied on would deprive him of his remedy. The mere putting up the notice is not sufficient for this, unless the party injured is at least in such a condition as to be able to become cognizant of its contents. The plaintiff could not read; the notice, therefore, furnished no information to him; and there were no circumstances in the way in which the dog was kept to apprise him of the danger. If, therefore, he had a right to be where he was, I see no fault or negligence in him to deprive him of his remedy. Still the defendant will not be liable unless he is in fault; unless he knows the character

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Liability for
damage to per-
sons or cattle
trespassing.

*Sark v.
Blackburn.*

of the dog, which he certainly did in this instance, and unless he keeps it improperly with that knowledge. The mere putting up the notice does not, I think, in this case excuse him. But it is said, that he has a right to keep a fierce dog to protect his property. He certainly has so; but not, in my opinion, to place it on the approaches to his house, so as to injure persons exercising a lawful purpose in going along those paths to the house. If the dog was placed in such a situation that he could injure the plaintiff, ignorant of the notice, and going for a lawful purpose to the house by a way which he was entitled to use, I think the defendant would not be protected from this action."

*Jordin v.
Crump.*

In *Jordin v. Crump* (s) it was held, that a man might lawfully place dog-spears on his own land, having a public footpath running across it, and that he would not be liable for damage inflicted by them on dogs deviating from the footpath, though they belonged to persons lawfully using the path. "Now in the present case," said *Alderson*, B., in delivering the judgment of the court, "the injurious act was done by the dog to the land of the defendant; and it is no answer to say that the plaintiff could not control the animal, and was therefore unable to guard against that danger. If he chose to walk with his dog along a footpath through ground on which the dog might commit a trespass, he knew the risk he was running; and the case is similar to that of a man who, passing in the dark along a footpath, should happen to fall into a pit dug in the adjoining field by the owner of it. In such a case, the party digging the pit would be responsible for the injury, if the pit were

(s) 8 M. & W. 782. The plaintiff had given notice of the existence of the dog-spears, but the court said that made no difference.

dig across the road; but if it were only in an adjacent field the case would be very different, for the falling into it would then be the act of the injured party himself" (*t*). The court then cite and recognize the case above given of *Blythe v. Topham* (*u*), and say, "that case, therefore, is an authority that the fact of a trespass being involuntary makes no difference in this respect."

Liability for
damage to per-
sons or cattle
trespassing.

*Jordin v.
Crump.*

The cases, some of which appear at first sight to be in opposition to this doctrine (*x*), are instances in which a party has resorted to the use of some dangerous engine or ferocious animal for the preservation of his property, and has thus done indirectly what the law would not allow him to do by his own hand, unless it were absolutely necessary to preserve his property from immediate injury (*y*). These decisions are at the best very doubtfully expressed; they appear to be overruled to some extent by the above case of *Jordin v. Crump*; and it is decided at all events that if the party injured had express notice, and nevertheless persisted in committing the trespass, he can obtain no redress, but must take the consequences of his own act (*z*).*

Damage by
ferocious
animals to
trespassers.

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[(*t*) See *Barnes v. Ward*; 628.

*Harcastle v. South Yorkshire
Railway and River Don Com-
pany*; *Hounsell v. Smythe*, ante,
pp. 463, 467, 468, acc.]

(*y*) *Vere v. Lord Cavilor*, 11
East, 568; *Janson v. Brown*, 1
Camp. 41; *Corner v. Champneys*,
2 Marshall, 584.

(*u*) 1 Rol. Abr. 88.

(*z*) *Hlott v. Wilks*, 3 B. & Ald.

(*x*) *Deane v. Clayton*, 7 Taunt. 304.
489; *Bird v. Holbrook*, 4 Bing.

* There is no obligation between neighbours that one shall take care to prevent the clippings of a poisonous tree, such as a yew-tree, growing on his land, from falling on to the other's. (*Wilson v. Newberry*, L. R., 7 Q. B. 31.) Nor is there a warranty by a landlord to his tenant that there is no such tree on the land demised. (*Erskine v. Adeane*, L. R., 8 Ch. 761.)

Liability for
damage to per-
sons or cattle
trespassing.

[The liability to repair fences, discussed in the former part of this section, is one which is not affected by Lord Tenterden's act, that act not applying to mere duties (*a*).]

Easement for
roots of trees.

There appears to be no authority in the English law, that, in the absence of express stipulation, an easement can be acquired by user, to compel a man to submit to the penetration of his land by the roots of a tree planted on his neighbour's soil.

The principal objections to the acquisition of such an easement consist in the secrecy of the mode of enjoyment, and the perpetual change in the quantity of inconvenience imposed by it.

Supposing no easement to exist, there seems nothing to take this out of the ordinary rule, that a man may abate any encroachment upon his property, and therefore that he may cut the roots of a tree so encroaching in the same manner that he may the overhanging branches (*b*).

Ownership of
boundary trees.

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The decided cases bearing upon this subject have turned rather upon the question of property in trees growing upon the limits of two adjoining heritages, than upon the question of easement.

Masters v.
Pollic.

Masters v. Pollic (*c*) was an action "of trespass *quare clausum fregit, et asportavit* the plaintiff's boards." The defendant justified, "That there was a great tree which grew between the close of the plaintiff and that of the defendant, and that part of the roots of the tree

[*(a)* See per *Williams, J.*, in *Peter v. Daniel*, 5 C. B. 573.]

[*(b)* 1 Rol. Rep. 894, *Norris v. Baker*, per *Croke, J.*

[*(c)* 2 Rolle, Rep. 141.]

extended into the close of the defendant, and were nourished by his soil; that the plaintiff cut down the tree, and carried it into his own close and sawed it into boards, and the defendant entered and took and carried away some of the boards, *prout ei benè licuit*." The plaintiff demurred to this plea, and it was contended that the plea was bad, for although some of the roots of the tree are in the defendant's soil, yet the body (*le corps del maine parte*) of the tree being in the plaintiff's soil, therefore all the residue of the tree belongeth to him likewise. And of this opinion is Bracton; but if the plaintiff had planted a tree in the soil of the defendant, it shall be otherwise, *quod curia concessit*; but *Mountague*, C. J., said, "That the plaintiff cannot limit the roots of the tree, how far they shall go." *Vide 2 Ed. 4, 23 (d)*.

Ownership of
boundary trees.

*Masters v.
Pollie.*

In an anonymous case reported in the same volume, it is said (*e*), "If a tree grow in a hedge which divides the land of A. and B., and by its roots take nourishment in the land of A. and also of B., they are tenants in common of the tree; and so it was adjudged."

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In *Waterman v. Soper* (*f*), "It was ruled by Holt, C. J., at Lent Assizes, at Winchester, upon a trial at Nisi Prius, 1697-8: 1st, That if A. plant a tree upon the extremest limits of his land, and the tree growing extends its roots into the land of B. next adjoining, A. and B. are tenants in common of this tree; but if all the roots grow into the land of A., though the boughs overshadow the land of B., yet the branches follow the root, and the property of the whole is in A. 2nd, Two tenants in common of a tree, and one cuts the whole tree

*Waterman v.
Soper.*

(*d*) This reference is incorrect. . . (*f*) 1 Lord Raymond, 737.

(*e*) P. 255.

Ownership of
boundary trees.

*Waterman v.
Soper.*

*Holder v.
Coates.*

—though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting; as where one tenant in common destroys the whole flight of pigeons.”

In *Holder v. Coates (g)*, an action of trespass was brought for cutting a tree of the plaintiff. The body of the tree stood in the defendant's land, but some of the lateral roots grew into the land of both parties. The evidence as to the position of the principal root was conflicting.

Littledale, J., referred to the case first above cited, from *Rolle's R.*, and expressed his preference for the law as there laid down over the ruling of Lord *Holt* in *Waterman v. Soper (h)*. The learned judge, in summing up, told the jury that he did not see on what grounds they could find for either party, as to the proportion of nourishment derived by the tree from the soil of the plaintiff and defendant respectively; “but that

[305] the safest criterion for them would be to consider whether, from the evidence given as to the situation of the trunk of the tree above the soil and of the roots within it, they could ascertain where the tree was first sown or planted.” Upon the jury saying that they could not tell in whose ground the tree first grew, a verdict for the defendant was taken by consent.

By the Civil Law, the neighbour into whose land the roots of a tree penetrated was not permitted to cut them off, although he might institute a suit to contest the right.

With regard to the property of a tree, the roots of which extended into two heritages, it would appear that if it derived its nourishment equally from both it became

(g) Moo. & Mal. 112.

(h) 1 Lord Raymond, 737.

common property. If it drew its nourishment substantially from one heritage only, on whichever side it was originally planted, the property passed to the owner of the land supplying the nourishment (*i*). Ownership of boundary trees.

Pothier, in his commentary on the passage of the Digest, that "the tree remains the property of him in whose soil it had its origin," says, "This is so, notwithstanding it is said in the Institutes, that the tree shall be considered his into whose soil the roots are protruded; for this is to be understood of such a protrusion of the roots as to draw all the nourishment for the tree from the neighbouring soil; but if my tree pushes the extremities of its roots only into my neighbour's soil, though it may by that means draw some nourishment therefrom, nevertheless the tree remains mine, because the tree has got its origin and the greater part of the roots in my soil." [306]

The Civil Law appears to agree with the rule as laid down in the anonymous case in Rolle, and in *Waterman v. Soper*, and, consequently, to be at variance with the opinion of *Littledale, J.*

The French Code contains many minute provisions upon this subject (*k*).

(*i*) Si arbor in vicini fundum radices porrexit, recidere eas vicino non licet; agere autem licet, non esse ejus, sicuti tignum, aut protectum, immissum habere. Si radicibus vicini arbor aletur, tamen ejus est, in cujus fundo origo ejus fuerit.—L. 6, § 2, ff. arb. furt. cas.

Si vicini arborem ita terrâ prescripserim, ut in meum fundum radices egerit, meam effici arborem. Rationem enim non permittere, ut al-

terius arbor intelligatur, quam cujus fundo radices egisset. Et ideo prope confinium arbor posita, si etiam in vicinum fundum radices egerit, communis est.—L. 7, § 13, ff. de acq. rer. dom.

L. § 31, ff. de rer. div. is identical in expression with the latter authority.

(*k*) Arts. 671-2-3, Code Civil; Pardessus, Traité des Servitudes,

PART II.

OF THE INCIDENTS OF EASEMENTS.

THE Incidents of Easements may be considered with reference to—

1st. The obligation to do the works necessary for the enjoyment of the easement, as to make repairs.

2nd. The secondary easements ancillary to, and depending upon, the primary easements.

3rd. The extent and mode of enjoyment.

CHAPTER I.

OBLIGATION TO REPAIR.

Servient owner
not bound to
repair.

AS a general rule, easements impose no personal obligation upon the owner of the servient tenement to do anything—the burden of repair falls upon the owner of the dominant tenement (*a*).

“Ad aquæ ductum,” says Bracton, “pertinet purgatio sicut ad viam pertinet refectio” (*b*).

“Where I grant a way over my land, I shall not be bound to repair it,” said *Twisden, J.*, in *Pomfret v. Rycroft* (*c*).

(*a*) “If the grantee of a way wants it to be repaired he must repair it himself.” See per *Coleman, J.*, in *Duncan v. Louch*, 6 Q. B. 909.

(*b*) Lib. 4, fol. 232, a.

(*c*) 1 Saund. 322, a; see also *Gerrard v. Cooke*, 2 Bos. & Pull. N. R. 109.

"By the common law of England, he that hath the use of a thing ought to repair it," said Lord *Mansfield* in *Taylor v. Whitehead* (d). Servient owner
not bound to
repair.
[308]

"The grantor of a way is not bound to repair it if it be foundrous" (e).*

This is in accordance with the principles of the Civil Law, which imposed the burthen of repair in cases of easement upon the owner of the dominant, and not upon the owner of the servient tenement (f).

By the French Code Civil (g), the expenses incurred in constructing any works necessary for the use or preservation of any easement, must be borne by the party entitled to it.

What is above said is to be understood with reference only to the non-liability to repair on the part of the owner of the servient tenement. When domi-
nant owner
liable for
damage.

It would appear on the principles hereafter considered, that, where the enjoyment of the easement is had by means of an artificial work (*opus manufactum*), the owner of the dominant tenement is liable for any damage arising from its want of repair. Thus, if a man carries water by means of conduit-pipes through his neighbour's land, he must keep those pipes in repair (h).

(d) 2 Douglas, 749.

(e) [See 1 Wms. Saund. 322
c; 1 Notes to Saund. 566;] Com.
Dig. (h) in (D. 6),

(f) In omnibus servitutibus re-
fectio ad eum pertinet, qui sibi
servitntem adserit, non ad eum

cujus res servit.—L. 6, § 8, L. 8,

ff. si serv. vind.

(g) Art. 698.

[(h) See *Bell v. Twentyman*, 1
Q. B. 766; and *Lord Egremont v.*
Pulman, M. & M. 404.]

* *Ingram v. Morecraft*, 33 Beav. 49. A flagstone and grating over an area between a raised road and a house were dedicated to the public as part of the highway. The public, and not the owner or occupier of the house, were bound to keep them in repair. (*Robbins v. Jones*, 15 C. B., N. S. 221.)

When dominant owner liable for damage.

Hoare v. Dickinson.

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Where the easement is natural, and the injury to the servient tenement arises from natural causes only, no such liability accrues.

The case of *Hoare v. Dickinson* (*i*), where an action was brought for the bad state of repair of some water-pipes, is not opposed to the principles above laid down, although from the point upon which the court gave judgment, it cannot be treated as an authority in support of it; nor indeed upon the facts as stated in the report could the point of liability to repair be raised; for the declaration did not state to whom the pipes belonged, nor that they ran through the plaintiff's land, but alleged merely that the defendant caused the water to run near the plaintiff's foundations, whereby they were rotted, so that, as the court said, the defendant was plainly a wrongdoer, and upon this ground they gave judgment (*k*)

Spurious easement to compel servient owner to repair.

A question appears to have been raised in some old cases, whether there was not by the law of England an exception to the rule already laid down—that the owner of the dominant tenement was bound to make the necessary reparations.

In Fitz. Nat. Brev. (*l*), there is a writ commanding the mayor and sheriff of a town to summon one before them for not repairing his cellar, to the damage of him who has a cellar beneath it, which by the *custom of the said town* he was bound to repair. The other writ *de reparatione faciendâ* (*m*) is the case of a house becoming ruinous and dangerous to the neighbouring houses.

(*i*) 2 Lord Raymond, 1568.

(*l*) 127 F.

[(*k*) See *Alston v. Grant*, 3 El. & Bl. 128.]

(*m*) 127 C.

There is a case in Keilwey (*n*), as follows:—"It seems to *Fineux* and *Brudnell* in the K. B., that where I have a chamber below (*meason pavaile*), and another has a chamber above mine (*haute meason*), as they have here in London, in this case I may compel him who has the chamber above to cover his chamber for the salvation of the timber of my chamber below; and in the same manner he may compel me to sustain my chamber below, by the reparation of the principal timber for the salvation of his chamber above.—*Nota et stude*. For some at the bar think that I may suffer my chamber to fall down (*deschuer*); but all were agreed that I could not abate my chamber to the destruction of the upper chamber (*o*), and the manner for me to compel another to sustain his chamber, *ut supra*, if the law be such, is by action on the case," &c.

Spurious easement to compel servient owner to repair.

So it is said by *Rainsford, J.*, in *Pomfret v. Ricroft* (*p*), "If a man devise by deed a middle room in a house, and afterwards will not repair the roof, whereby the lessee cannot enjoy the middle room, an action of covenant lies for him against his lessor."

The case in Keilwey was doubted by Lord *Holt*, in *Tenant v. Goldwin* (*q*), where he said, "he thought the writ in Fitzherbert must be founded upon the particular custom of places." Serjeant Williams, in his note to *Pomfret v. Ricroft* (*r*), observes, "It is difficult to say upon what other ground but custom such an action can be supported."

In *Edwards v. Halinder* (*s*), an action was brought

Edwards v. Halinder.

(*n*) 98 b.

Raymond, 1089.

(*o*) Vide per *Parke, B.*, in *Har-
ris v. Ryding*, 5 M. & W. 71.

(*r*) 1 Saund. 322, note; 1 Notes
to Saund. 558.

(*p*) 1 Saund. 322.

(*s*) 2 Leon. 93; S. C. Popham,

(*q*) 1 Salk. 360; S. C. 2 Lord 46.

Spurious ease-
ment to compel
servient owner
to repair.

*Edwards v.
Halinder.*

by the tenant of a cellar against the tenant of the room above, both holding under the same landlord, for overloading his floor, whereby it fell through and destroyed the plaintiff's wine in the cellar beneath.

The defendant pleaded, "That, before the charging of the floor, *ut supra*, the said floor had sustained greater weight, and, further, that the landlord let the said shop to him, to lay there the weight of thirty tons, and he had laid there but the weight of twelve tons; and also that the walls of the said cellar were so weak that the floor of the said shop fell by reason thereof." Upon which there was a demurrer in law, and judgment was given for the plaintiff, which was affirmed on a writ of error in the Exchequer Chamber, as it would appear, upon the ground that there being no traverse of the fact charged in the declaration—the overloading—the plea was impertinent. Nothing whatever was decided as to the liability to repair.

Gent, B., was of opinion, "That the defendant had not fully answered the declaration, for he was charged with the laying too much weight on the floor there, so as *vi ponderis* it fell down; to which the defendant has said that the walls were ruinous *in occultis partibus*, and doth not answer to the surcharging (*scil.*) *absque hoc*, that he did surcharge."

Clarke, B., agreed with *Gent*, B., as it appears, in opposition to *Manwood*, C. B., who thought no traverse was necessary.

The report in *Popham* gives the argument in the Exchequer Chamber; from which it appears that the judgment was affirmed on the same ground that it was given below.

In an anonymous case (*t*), it is said, "If a man has an upper room, an action lies against him by one who has an under room, to compel him to repair his roof. And so where a man has a ground room, they over him may have an action to compel him to keep up and maintain his foundation. *Sed quære*. For if a man build a new house under the roof of an old one which is ready to tumble, whether he shall have a writ *de reparatione faciendâ*, because *debet et consuevit* are necessary words in the declaration."

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Holt, C. J., said, "That every man of common right ought so to support his own house as that it may not be an annoyance to another man's" (*u*).

The report of the case in *Keilwey* in reality amounts to no more than a statement that such a point had been agitated. The dictum of *Rainsford*, J., in *Pomfret v. Ricraft*, was probably founded, according to Serjeant Williams, upon this report; there seems also some doubt whether it did not proceed on the ground of a covenant implied in the demise. The writ in *Fitzherbert* is obviously founded on a local custom only; and the case in *Leonard* went off entirely on a point of pleading: there appears, therefore, to be no authority whatever to oppose to the opinion of Lord *Holt*, that such an obligation could only exist when specially imposed (*x*).

Result of authorities.

(*t*) 11 Mod. 7.

[*u*] See this dictum referred to per Cur. in *Alston v. Grant*, 3 E. & B. 128. But he is not bound to repair it, but only to prevent his neighbour from being injured by its fall. *Chauntler v. Robinson*, 4 Exch. 163, per Cur. Note the distinction between such cases and those in which, although there be

no duty to repair, yet the defendant is held liable for injury caused by a use of some part of his premises, ex. gr. a drain, which, by reason of its improper construction, causes damage to the neighbour's house, as in *Alston v. Grant*, 3 E. & B. 128.]

(*x*) [See Serjt. Williams' note, 1 Wms. Saund. 321; 1 Notes to

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Paries oneri ferendo.

The Civil Law, it is true, recognizes the existence of such an easement as this (*oneris ferendi*), as distin-

Saund. 558, acc.] The following cases are given in the American edition of this book, by "E. Hammond, Counsellor at Law," New York, 1840. In *Loring v. Bacon*, 4 Mass. Rep. 575, the question arose whether the owner of the lower part of the house was obliged to contribute to the repairs of the upper part. *Parsons*, C. J., in delivering the judgment of the court, says:—"The plaintiff declares in case upon several promises. The first count is *indebitatus assumpsit* in the sum of eighty dollars, according to the account annexed to the writ, the items of which are for timber, boards, shingles, nails and labour, and victualling the workmen. The second count is a *quantum meruit* for the same items, technically supposed to be different but similar. The third count is a general *indebitatus assumpsit* for eighty dollars, laid out and expended.

"The facts being agreed by the parties, the question of law comes before the court on a case stated. From this case, it appears, that the defendant is seised in fee simple of a room on the lower floor of a dwelling-house, and of the cellar under it; and that the plaintiff is seised in fee of a chamber over it, and of the remainder of the house; that the roof of the house was so out of repair, that unless repaired no part of the house could be comfortably occupied; that the defendant, though seasonably requested by the plaintiff, refused to join

with him in repairing it; and the plaintiff then made the necessary repairs, and has brought this action to recover damages for her refusal to join in the repairs. It is also agreed that the parties had from time to time repaired the respective parts of the house at their several expense. And the question submitted to the court is, whether the plaintiff can recover in this action.

"This is an action of the first impression. No express promise is admitted; but, if there is a legal obligation on the defendant to contribute to these repairs, the law will imply a promise.

"We have no statute, nor any usage upon this subject, and must apply to the common law to guide us.

"Although, in the case, the parties consider themselves as severally seised of different parts of one dwelling-house, yet, in legal contemplation, each of the parties has a distinct dwelling-house adjoining together, the one being situated over the other. The lower room and the cellar are the dwelling-house of the defendant; the chamber, roof and other parts of the edifice are the plaintiff's dwelling-house. And in this action it appears that, having repaired his own house, he calls upon her to contribute to the expense, because his house is so situated that she derives a benefit from his repairs, and would have suffered a damage if he had not repaired.

guished from the ordinary easement of support (*tigni immittendi*); but it appears, that the additional obligation to repair is a *spurious easement to compel servient owner to repair*.

“Upon a very full research into the principles and maxims of the common law, we cannot find that any remedy is provided for the plaintiff.

“Houses for the habitation, and mills for the support of man, are of high consideration at common law; and, when holden in common or joint tenancy, remedies are provided against those tenants, who refuse to join in necessary reparation, by the writ *de reparatione faciendâ*; Co. Litt. 200 b.; Fitz. N. B. 295. In Co. Litt. 56 b, it is said, that if a man has a house so near to the house of his neighbour, and he suffers it to be so ruinous that it is likely to fall on his neighbour's house, he may have a writ *de domo reparandâ*, and compel him to repair his house. In Keilwey, 98 b, pl. 4, there is a case reported, in the time of Henry the Eighth, in which Fincux and Brudnell, justices of the king's bench, were of opinion, that if a man have a house underneath, and another have a house over it, as in the case in London, the owner of the first house may compel the other to cover the house, to preserve the timbers of the house underneath; and so may the owner of the house above compel the other to repair the timbers of his house below; and this by action of the case. But some of the bar were of opinion, that the owner of the house underneath might suffer it to fall; yet all agreed that he

could not pull it down to destroy the house above. And in Fitz. N. B. 296, there is a writ of this kind. But in the case of *Tenant v. Goldwin*, 6 Mod. 314, Lord Holt was of opinion that this writ was by virtue of a particular custom, and not of the common law; and he doubted the case in Keilwey.

“But there is unquestionably a writ at common law, *de domo reparandâ*, the form of which we have in Fitz. N. B. 295, in which A. is commanded to repair a certain house of his in N. which is in danger of falling to the nuisance of the freehold of B. in the same town, and which A. ought, and hath been used, to repair, &c. This writ, Fitzherbert says, lies when a man, who has a house adjoining to the house of his neighbour, suffer his house to lie in decay to the annoyance of his neighbour's house. And if the plaintiff recover, he shall have his damages; and it shall be awarded that the defendant repair, and that he be restrained until he do it. But it is otherwise in an action of the case; for there the plaintiff can recover damages only. And there appears no reasonable cause of distinction in the cases, whether a house adjoin to another on one side, or above, or underneath it.

“But if the case in Keilwey is law, the plaintiff cannot recover, for by that case the defendant could have compelled the plaintiff to repair his house, or compensate her

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tion of repair could only be imposed by an express stipulation to that effect in the instrument creating the

in damages for the injury she had sustained from his neglect to repair it. And he has the like remedy against her.

"If the case in *Keilwey* is not law, then, upon analogy to the writ at common law, the plaintiff cannot compel the defendant to contribute to his expenses in repairing his own house. But if his house be considered as adjoining to hers, she might have sued an action of the case against him, if he had suffered his house to remain in decay to the annoyance of her house.

"In every view of this case, there is no legal ground on which the plaintiff's action can be supported. We do not now decide on the authority due to the case in *Keilwey*; but if an action on the case should come before us founded on that report, it will deserve a further and full consideration. The plaintiff must be called."

In *Cheesborough v. Green*, 10 Conn. 318, which was an action on the case brought by the owner of the lower part of a store against the owner of the upper part and roof of the building to recover damages for suffering the roof to be out of repair, the court held, that the action could not be sustained; in a Court of Chancery only can the plaintiff have adequate remedy. *Daggett*, Ch. J.: "The declaration, in substance, is that the plaintiff owns the first and second stories of a brick store,

and the defendant owns the third story and roof. The defendant has suffered the roof to decay and become leaky and ruinous, so that the lower part of the building is injured, and for this neglect of the defendant this action is brought. The Superior Court, on a trial, found the facts alleged true, but adjudged the declaration insufficient. It is now to be decided by this court, whether this action can be sustained. There is no statute, nor any custom, nor any adjudged case in Connecticut on the subject. The plaintiff relies upon the principles of the common law to uphold this action. He founds himself principally on a case, *Keilwey*, 98 b, pl. 4, where the doctrine was laid down by two judges of the Court of King's Bench. In *Tenant v. Goldwin*, 6 Mod. 314; S. C. 1 Salk. 360, Lord Holt disapproved of the case in *Keilwey*, and said, that it was supported by the custom of particular places, and not by the common law. There was a writ de reparatione faciendâ against those of several joint tenants, or tenants in common, who refused to join in necessary repairs. So if the house of A. be near that of B., and the former becomes so ruinous that it endangers the latter, B. may have a writ de domo reparandâ, and compel A. to repair his house. I am not aware that any such writ has been known in the practice of our courts. Perhaps an action on

easement (*y*), or at all events there must have been a prescriptive right to the repair, as well as to the support. Spurious easement to compel servient owner to repair.

the case would lie against any one who should negligently suffer his building to decay, and fall on and injure the property of another, on the maxim *Sic utere tuo ut alienum non lædas*. That, however, is not this case.

"Nor can we say, in the absence of statute regulation, or express decision, that this doctrine is so reasonable that an action can be sustained. In large cities, houses generally consist of four or five stories. The owner of the fifth story, upon the principle assumed by the plaintiff, is compellable to furnish a sufficient roof to protect the whole building against water. Also, the owner of each story is obliged to secure the side and ends, as the case may be, against the entrance of water to the annoyance of all those who own or occupy below. The owner of the lower story is compellable, also, to keep the foundation suitably repaired, to sustain each of the other stories, with their additional (as the case may be) superincumbent weight.

"These considerations, and

others easily suggested, would lead to the conclusion, that a remedy in such case can be furnished only by a Court of Chancery. The principles adopted by Chancellor *Kent* in *Campbell v. Mesier & al.*, 4 Johns. Ch. Rep. 334, countenance this idea. The case of *Loring v. Bacon*, 4 Mass. Rep. 575, was pressed by the counsel for the plaintiff. There, it was decided, that the owner of the upper story could not recover in *assumpsit* against the owner of the floor and cellar, for necessary repairs to the roof. Chief Justice *Parsons* speaks of the case in *Keilwey*, without deciding on its authority. He does not decide the plaintiff to be without remedy: he says truly, he has no legal ground for recovery. It will be borne in mind, that there was then [1806] no court of chancery in Massachusetts." *

(*y*) *Modus autem refectionis in hac actione ad eum modum pertinet, qui in servitute imposita continetur: forte, ut reficiat lapide quadrato, vel lapide structili, vel quovis alio opere, quod in servitute dictum est.—L. 6, § 5, ff. si serv.*

* In *Graves v. Burdan* (26 N. Y. 501), Judge *Rosekrans* says—"The rule seems to be settled in England, that when a house is divided into different floors or stories, each occupied by different owners, the proprietor of the ground-floor is bound by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property, so that it may be able to bear such weight. The proprietor of the ground story is obliged to uphold it for the support of the upper story." (See Washburn on Easements, 564 to 573)

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Indeed it has been doubted whether such an easement could exist at all, unless the precise technical expression "*paries oneri ferendo*" was inserted in the original grant (*z*).

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The servitude of the Civil Law, called "*paries oneri ferendo*," imposed upon the owner of the servient tenement the obligation not only of supporting the dominant edifice, but also of keeping his own buildings in such a state of repair, as should enable them to sustain the pressure. The validity of this servitude, though admitted to be of an anomalous character, appears to have been fully established, notwithstanding some difference of opinion upon this subject (*a*); but still it was said

vind. "Il ne faut pas croire, avec le plus grand nombre des interprètes du droit, que la servitude *oneris ferendi* ait été une exception à cette règle. Il était bien d'usage de stipuler dans cette servitude, que le voisin serait obligé de reconstruire et d'entretenir le mur, ou le pilier qui soutenait quelque partie du bâtiment voisin; mais c'était là l'effet, non pas du droit de servitude en lui-même, mais d'une stipulation particulière, ajoutée au droit de servitude. Encore Aquilins Gallus, l'un des plus célèbres jurisconsultes Romains, prétendait-il que cette obligation était contraire à la nature des servitudes. Les autres jurisconsultes se contentaient de dire que le voisin pouvait se libérer de cette obligation en abandonnant le fonds sur lequel le mur, ou la colonne, qui portait l'édifice voisin, était situé; et dans tout cas, le propriétaire du fonds dominant

n'en pouvait pas demander le rétablissement par l'action réelle *confessoria servitutis*, mais seulement en vertu de l'équité, *imploratione officii judicis*." — Merlin, Répertoire de Jurisprudence, tit. Servitude, p. 44.

(*z*) Stair's Inst. 328; Erskine, Inst. 431.

(*a*) Eum debere columnam restituere, quæ onus vicinarum ædium ferebat, cujus essent ædes, quæ servirent: non eum, qui imponere vellet: nam cum in lege ædium ita scriptum est — *paries oneri ferendo, uti nunc est, ita sit* — satis aperte significari, in perpetuum parietem esse debere; non enim hoc his verbis dici, 'ut in perpetuum idem paries æternus esset,' quod ne fieri quidem posset, sed 'uti ejusdem modi paries in perpetuum esset qui onus sustineret,' quemadmodum, si quis alicui cavisset, ut servitutem præberet, qui onus suum sustineret, si ea res,

that the obligation was not upon the person, but upon the tenement, and that by relinquishing the tenement, the owner's liability to repair was determined (*b*).

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This obligation to repair was, however, strictly construed, and did not carry with it as an incident any obligation to furnish support to the dominant tenement during any necessary reparation of the servient tenement. In this respect the owner of the dominant tenement was bound to take care of himself, by shoring or other means, or, if he neglected so to do, he might "take down his (*c*) house and rebuild it when the wall was restored" (*d*).

quæ servit, et tuum onus ferret, perisset, alia in locum ejus dari debeat.—L. 33, ff. de serv. præd. urb.

In servitute oneris ferendi hoc amplius est, quod vicinus columnam aut parietem qui oneri fereundo est reficere tenetur, et idoneum onere sustinendo præstare, quâ parte servitus hæc degenerat et spuria esse agnoscitur — quippe cum contrâ naturam servitutum hoc sit ut quis cogatur aliquid facere in suo.—Vinnius, Inst. Lib. 2, tit. 3, de serv. urb. § 3.

Etiam de servitute, quæ oneris ferendi causâ imposita erit, actio nobis competit, ut et onera ferat, et ædificia reficiat ad eum modum, qui servitute impositâ comprehensus est. Et Gallus putat, non posse ita servitutem imponi, 'ut quis facere aliquid cogeretur,' sed 'ne me facere prohiberet:' nam in omnibus servitutibus resectio ad eum pertinet qui sibi servitutem adserit; non ad eum, cujus res servit. Sed evaluit Servii sententia in propositâ specie, ut possit

quis defendere, jus sibi esse, cogere adversarium reficere parietem ad onera sua sustinenda.—L. 6, § 2, ff. si serv. vind.

(*b*) Labeo autem hanc servitutem non hominem debere, sed rem; denique licere domino rem derelinquere, scribit. Ibidem.

Hæc autem actio in rem magis est, quam in personam: et non alii competit, quam domino ædium, adversus dominum; sicuti cæterarum servitutum intentio.—Ibid. § 3.

(*c*) "Ironical counsel," says Pothier.

(*d*) Sicut autem resectio parietis ad vicinum pertinet, ita fultura ædificiorum vicini, cui servitus debetur, quamdiù paries reficitur, ad inferiorem vicinum non debet pertinere; nam, si non vult superior fulcire, deponat: et restituet cum paries fuerit restitutus. Et hic quoque sicut in cæteris servitutibus, actio contraria dabitur: hoc est, *jus tibi non esse me cogere*.—L. 8, ff. si serv. vind.

**Spurious ease-
ment to compel
servient owner
to repair.**

The analogous servitude "*tigni immittendi*," clearly imposed no obligation on the owner of the servient tenement to keep his walls in repair; the right conferred was "to insert a beam into the neighbour's wall, so that it might remain there, and the neighbour's wall might sustain the weight," but nothing beyond this (*e*).

Code Civil.

[315]

By the French Civil Code, when the different stories of a house belong to different proprietors, their respective rights and liabilities are fixed with great minuteness—supposing the instruments creating their respective titles to contain no provisions for repair. The main walls (*gros murs*) and roof are kept in repair at the expense of all the proprietors (each contributing according to the value of the portion which belongs to him: the proprietor of each story is bound to keep in repair his own floor; the proprietor of the first story is bound to keep in repair the staircase leading up to it; the proprietor of the second is bound to keep in repair that part of the staircase which leads from the first story to him; and so with regard to the other proprietors (*f*)).

(*e*) In imponendâ servitute tigni immittendi hoc agitur, ut ex nostro pariete liceat tignum trabem immittere in parietem vicini ita ut ibi requiescat, et vicini paries sustineat onus immissi—nihil amplius.—Vinnius, Inst. Lib. 2, tit. de serv. urb. 3.

Competit mihi actio adversus eum, qui cessit mihi (talem) servitutem, ut in parietem ejus tigna immittere mihi liceat, suprâque ea tigna (verbi gratiâ), porticum ambulatorem facere, superque eum parietem columnas structiles im-

ponere, quæ tectum porticûs ambulatoriæ sustineant.—L. 8, § 1. ff. si serv. vind.

Distant autem hæ actiones (*i. e.* oneris ferendi et tigni immittendi) inter se: quod superior quidem locum habet etiam ad compellendum vicinum reficere parietem (meum); hæc vero locum habet ad hoc solum, ut tigna suscipiat: quod non est contra genera servitutum. Ibid. § 2.

(*f*) Art. 664; Pardessus, Traité des Servitudes, 288.

The Scotch Law, which to a great extent is based upon the Civil Law, is in accordance with the doctrine, "that to impose such an obligation to repair on the owner of the servient tenement, there must be either an express stipulation to that effect, or actual proof that there is a prescriptive right to the repair as well as to the support."

Spurious easement to compel servient owner to repair.

"The precise positive servitude of city tenements," Lord Stair. says Lord Stair, "is the servitude of support, whereby the servient tenement is liable to bear any burden for the use of the dominant, and that, either by laying on the weight upon its walls or other parts thereof, or by putting in joists, or other means of support, in the walls of the same, which the Romans called *servitutem tigni immit-tendi*; or otherwise, this servitude may be, by bearing the pressure, or putt, of any building, for the use of the dominant tenement, as of a vault, or pend, or the like; such is the servitude of superstructure whereby any building may be built upon the servient tenement. Like unto which is now frequent in Edinburgh, when one tenement is built above another, at diverse times, or diverse stories, or contignations of the same tenement [316] are bought by diverse proprietors, and thereby the upper becomes a distinct tenement, and hath a servitude upon the lower tenements, whereby they must support it. The question useth to be moved here, whether the owner of the servient tenement be obliged to uphold or repair his tenement, that it may be sufficient to support the burden of the dominant tenement?

"There are opinions of the learned, and probable reasons upon both facts, for the affirmation maketh the common rule, that, when anything is granted, all things are understood to be granted therewith that are necessary

Spurious easement to compel servient owner to repair.

Lord Stair.

thereto ; so he who constituteth upon his tenement a servitude of support, must make it effectual ; and for that negative servitudes are odious, and not to be extended beyond what is expressly granted or accustomed, to which we incline ; and, therefore, it would be adverted how the servitude is constituted, that, if it appear the constituent had granted this servitude so as to uphold it, not upon the account of his own tenement, but of the dominant, he must so continue ; and it is not only a personal obligation, but a part of the servitude passing with the servient tenement, even to singular successors : but if it appear not so constituted, it will import no more than a tolerance to lay on or impute the burden of the dominant tenement upon the servient, which, therefore, the owner of the servient neither can hinder or prejudice ; but he is not obliged to do any positive deed by reparation of his own tenement to that purpose ; but the owner of the dominant tenement hath right to repair it for his own use, by reason of his servitude, and the owner of the servient tenement cannot hinder him ; yea, in what he thereby advantages the servient tenement, he hath upon the owner thereby the natural obligation of recompence in quantum lucratus.

[317]

“ If it be objected, that, within burgh, the owners of the inferior and supporting tenements are obliged to repair for the behoof of the superior tenements, the owners whereof may legally enforce reparation ; yet it inferreth not this to be the nature of a servitude, but a positive statute or custom of the burgh for the public good thereof, which is concerned in upholding tenements. But mainly the reason of it is, because when diverse owners have parts of the same tenement, it cannot be said to be a perfect division, because the roof

remaineth roof to both, and the ground supporteth both ; and therefore, by the nature of communion, there are mutual obligations upon both, viz., that the owner of the lower tenement must uphold his tenement as a foundation to the upper, and the owner of the upper tenement must uphold his tenement as a roof and cover to the lower, both which, though they have the resemblance of servitudes, and pass with the thing to singular successors, yet they are rather personal obligations, such as pass in communion even to the singular successors of either party" (g).

Spurious easement to compel servient owner to repair.

A somewhat similar question arises in the case of a public highway or bridge, where a particular person is held liable to repair *ratione tenuræ* (h), or by prescription, contrary to the common law, by which the obligation is imposed upon the parish or county (i).

Liability of servient owner to repair by prescription or tenure.

"Et sicut poterit quis facere nocumentum injuriosum in faciendo, ita poterit in non faciendo, in proprio vel in alieno, ut si ex constitutione obstruere et claudere, purgare et reficere, et non fecerit, cum ad hoc teneatur" (h).

[318]

If a man, who is bound by tenure to repair a certain causeway by prescription, does not repair it, per quod my land is surrounded, I may have an action on the case against him (l).

As, however, the obligation thus imposed on the servient tenement is contrary to the usual incidents of easements, it will, of course, require greater strictness of proof.

(g) Stair's Institutes, Book 2, tit. 7, s. 6.

the County of Wilts, Salkeld, 359.

(h) 2 Inst. 700; Com. Dig. Chimin, A. 4; [or *clausuræ*, *Reg. v. Ramsden*, E. B. & E. 949.]

(k) Bracton, Lib. 4, f. 232 b; Com. Dig. tit. Chimin, D. 6.

(i) *Regina v. Inhabitants of*

(l) 29 Edw. 3, 32 b; and see 1 Wms. Saunders, 322; 1 Notes to Saund. 565.

Liability of
servient owner
to repair by
prescription or
tenure.

Although, as it should appear by the civil law, with the single exception of the *servitus oneris ferendi*, no easement could exist which imposed on the owner of the servient tenement an obligation to repair, and any stipulation to that effect was personal, binding on the contracting parties only, and not imposing any charge upon the inheritance, so as to pass with it into the hands of a new owner; yet there is little doubt that, by the law of England, such an obligation may be imposed either by express grant or prescription (*m*).

[319] Any stipulation by deed, affecting the quality or mode of enjoyment of land—as, for instance, a covenant to repair a house upon it (*n*)—runs with the land; and this doctrine applies to implied as well as express covenants (*o*); and as a prescriptive right to an easement is equivalent to an express stipulation by deed, which the law allows to be made in favour of the successive owners of the neighbouring tenement, it seems that the same consequences must follow from it (*p*).

If a man make a bridge for the common good of all

[(*m*) See Com. Dig. tit. Abatement, H. 13, as to liability to repair river banks. It is to be observed, that Lord Tenterden's Act does not affect "mere duties," and that a *liability* to repair could not be established under it, though a *right* to repair, as accessory to the enjoyment of some easement, may.]

(*n*) 2 Inst. 701.

(*o*) *Spencer's case*, 5 Rep. 16; [1 Smith's L. C. 5th ed. 53;] *Mayor of Congleton v. Pattison*, 10 East, 135.

[(*p*) The authorities appear to show that the burthen of a cove-

nant does not run with land, so as to bind an assignee, except as between landlord and tenant (*ante*, 85); and the case of a liability to repair is no exception, as such liability is in the nature of an easement (see per *Bayley, J.*, 6 B. & C. 839), and even if it originated in an express covenant, upon a severance of ownership, the legal effect, it should seem, would be the grant of a right in the nature of an easement (*ante*, pp. 85, 86), and any subsequent action would be for the infringement of the right so created, not for breach of covenant.]

the subjects, he is not bound to repair it, for no particular man is bound to reparation of bridges by the common law, but *ratione tenuræ*, or *prescriptionis* (*q*). As to the second, the remedy was if it were a private bridge, as to a mill, which A. was bound to maintain, over which B. had a passage, &c., if the bridge were in decay B. might have his writ *de ponte reparando* (*r*).

Liability of
servient owner
to repair by
prescription or
tenure.

"By the common law," says Lord *Mansfield*, "he that hath the use of a thing ought to repair it;" but "the grantor may bind himself" (*s*).

However, says Mr. Serjeant Williams in the note to *Pomfret v. Ricroft*, "the grantor of a right of way may be bound either by express stipulation or prescription to repair it" (*t*): and he cites the case of *Rider v. Smith* (*u*), in which an action was brought against the owner of a close for not keeping in repair a footway running across it, and the court held, that a declaration, alleging that, "by reason of his possession," the defendant ought to repair, was good on demurrer, and that the special matter of the obligation might be given in evidence; thus recognizing, at all events, the possibility of such an obligation being established.

As the burden of repair is by law imposed upon the Right of domi-

[*(q)* As to statutory liability to repair bridges, see *Allen v. Mitchell*, Q. B. 17 Jan. 1862.]*

(r) *Sampson v. Easterby*, 9 B. & Cr. 505; 4 Man. & Ry. 422; S. C. in error, *Easterby v. Samp-*

son, 1 Cr. & J. 105; 4 Moo. & P. 601.

(s) *Taylor v. Whitehead*, 2 Doug. 745.

(t) 1 Wms. Saund. 322 c; 1 Notes to Saund. 566.

(u) 3 T. R. 766.

* *Tilburina* cannot see the Spanish fleet, because it is not yet in sight. The gentle reader cannot see this interesting case, because it has sailed into the far distance and left no trace behind.

nant owner to
repair.

[320]

owner of the dominant tenement (*x*), a corresponding right is also conferred upon him—to do all those acts which may be necessary to secure the full enjoyment of the easement, even though he should thereby be compelled to commit a trespass. This right to do all such acts as are essential to the enjoyment of the easement granted, was recognized in a very early case (*y*).

9 Edw. 4.

Choke, J.—“If a man grant me (a right) to dig in his land and to make a trench from a certain fountain or spring to my place, so that I may lay down a pipe to convey the water to my place, if afterwards the pipe is stopped or broken so that the water run out of it, I cannot dig in his land to amend the pipe—for this was not granted to me—but if he grant that I may dig, &c., to amend the pipe, totiens quotiens, &c., then I shall dig. And, in like manner, if I prescribe to have such a conduit, I must also prescribe to scour and amend it, totiens quotiens, &c., or otherwise I cannot dig in his land to amend, &c. But this was denied in both cases, for it was said by the court, that it is incident to such grant to scour and amend” (*z*).

*Pomfret v.
Ricroft.*

Thus, in the case of *Pomfret v. Ricroft* (*a*), already cited, it was held, that where a party had an easement to use a pump in his neighbour's land, “although neither the soil nor the pump itself was granted to him, yet by the grant of the use of the pump the law had given him the liberty (to enter upon the land and repair the pump), for when the use of a thing is granted, every thing is granted by which the grantee may have and enjoy such

[*(x)* And a liability for injury arising from the non-repair, *Egre-
mont v. Pulman*, M. & M. 404;
Bell v. Twentyman, 1 Q. B. 706.]

[*(y)* 9 Edw. 4, 35.

[*(z)* See as to the second case,
Peter v. Daniel, 5 C. B. 568.]

[*(a)* 1 Saund, 321.

use. As if a man gives me a license to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me" (*b*). In this case the action (which was in covenant) was brought by the grantee of the easement, for a breach of the implied covenant to repair on the part of the grantor. The Court of K. B. gave judgment for the plaintiff, which was afterwards reversed in the Exchequer-Chamber, upon the grounds above given.*

Right of dominant owner to repair.

[321]

As, then, at common law, the obligation to repair falls on the owner of the dominant tenement—and it must be his own fault if the way be impassable—he can have no right to leave the ordinary track on account of its want of repair, for which the owner of the land is not answerable (*c*); though it may be otherwise, in the case of public highways.

Right to deviate, if way foundrons.

There is no authority expressly deciding this point, where the obligation is imposed by prescription, or otherwise, on the servient tenement.

It is thus stated in Comyns's Digest—†

"If a man be bound by prescription to the repair of Private way.

(*b*) This is cited as clear law by 4 M. & Sel. 387, overruling 2 Loid *Coke* in *Liford's case*, 11 Blackstone's Com. 36; [1 Wms. Rep. 42 a. Saund. 322 c; 1 Notes to Saund.

(*c*) *Taylor v. Whithead*, 2 565.]
Doug. 745; *Bullard v. Harrison*,

* A publican who has the easement of a sign-post on a common before his house is entitled to repair it, and to replace it when it falls into decay. (*Hoare v. Metropolitan Board of Works*, L. R., 9 Q. B. 296.) Where there is an easement of a drain, and the sewer with which it communicates is altered the owner of the dominant tenement may alter the drain to adapt it to the new sewer. (*Finlinson v. Porter*, L. R., 10 Q. B. 188.)

† Com. Dig. Chimin, D. 6.

Right to
deviate, if way
foundrous.

a way, he need not keep it in better repair than it always was.

“But if it be impassable, a passenger may break the fence, and go *extra viam* as much as is necessary to avoid the bad way.” Upon reference, however, to the original authority (*d*), it clearly appears that the grantor of the way was bound to keep it in repair.

[322] The misapprehension of the authority cited in Comyns's Digest (*e*) appears to have originated in the mistake of Blackstone, who lays it down, that in public, as well as in private ways, a man who had the right of way might, if it were out of repair, go over the adjoining land (*f*).

The cases cited by Blackstone, in support of this position, appear to be those of public ways only.

This distinction is also recognized by the civil law; if the public highway was impassable, a traveller might pass along the land adjoining; but no such right appears to have existed in respect of private ways (*g*).

(*d*) Cited in *Henn's case*, Sir W. Jones, 296. [So that his failure to repair would be like an actual obstruction by him. See as to the latter, *Robertson v. Gantlett*, 16 M. & W. 289.]

(*e*) See *Bullard v. Harrison*, 4 M. & Sel. 390.

(*f*) 2 Comm. 36.

(*g*) Cum via publica vel fluminis impetu vel ruinâ amissa est, vicinus proximus viam præstare debet.—L. 14, § 1, ff. quemad. serv. amit.

Si locus, per quem via, aut iter,

aut actus debebatur, impetu fluminis occupatus esset, et intra tempus, quod ad amittendam servitutem sufficit, alluvione factâ, restitutus est, servitus quoque in pristinum statum restituitur. Quod si id tempus præterierit, ut servitus amittatur, renovare eam cogendus est.—Ibid.

Per agrum quidem alienum, qui servitutem non debet, ire vel agere vicino minimè licet: uti autem viâ publicâ nemo recte prohibetur.—C. L. 11, ff. de serv. et aquâ.

CHAPTER II.

SECONDARY EASEMENTS.



IT has been already seen, that certain easements are implied by law as incident to a grant, since without them the thing granted could not be fully enjoyed (*a*); in the same manner the express or implied grant of an easement is accompanied by certain secondary easements necessary for the enjoyment of the principal one. Secondary easements implied by law.

Bracton speaks of easements in general as appurtenances of "tenements," and of these secondary easements as appurtenances of the former (*a*):—"Omnia jura prænotata et omnes servitutes sunt de pertinentiis tenementorum, et pertinent a tenemento ad tenementa; et habent hujusmodi pertinentiæ suas pertinentias, sicut ad jus pascendi et ad pasturam pertinet via et liber ingressus et egressus. Et eodem modo ad jus fodiendi, falcandi, et secandi, hauriendi, potandi, piscandi, venandi, et hujusmodi, liber accessus et recessus, scilicet via, iter, et actus, ratione diversorum usuum ut suprâ. Item ad jus aquæ ducendæ pertinet purgatio. Item ad iter, secundum quod est de pertinentiis pertinentiarum, vel de pertinentiis per se, ut si via per se concedatur sine aliâ servitute, pertinet reffectio, sicut ad aquæ ductum pertinet purgatio" (*b*).

This, like the general case of implied easements, is

(*a*) See ante, "Easements of Necessity."

(*b*) Bracton, lib. 4, f. 232 a.

Secondary
easements
implied by law.

comprehended under the maxim, "Lex est cuicunque aliquis quid concedit, concedere videtur et id sine quo res esse non potuit" (*c*).

Thus, too, in the civil law, the right to a servitude drew with it a right to such secondary servitudes as were essential for its enjoyment (*d*).

Extent of do-
minant owner's
right.

In doing the works which are necessary for the enjoyment of the easement, the owner of the dominant tenement may do everything that is required for the full and free exercise of his right.

*Senhouse v.
Christian.*

Thus, it has been held, that the grant of a right of way, with liberty to make and lay causeways, and to use and enjoy the same, with wains, carts, waggons, and other carriages, and to carry coals, authorized the grantee to lay a framed waggon-way (*e*). "The question is," said *Ashurst, J.*, in his judgment in that case, "whether, under this general grant for the purpose of carrying coals among other things, he has a right to make *any such way* as is necessary for the carrying of that commodity. There are no great collieries in the northern part of the kingdom where they have not those framed waggon-ways. And the case itself expressly states, that the defendant cannot so commodiously enjoy this way in any other manner. Therefore, under the original grant, he has a right to make a framed waggon-way along the slip of land in question, which is necessary for the purpose of carrying his coals, it being in the

(*c*) *Liford's case*, 11 Rep. 52 a.

(*d*) Qui habet haustum, iter quoque habere videtur ad hauriendum et (ut ait Neratius, lib. 3, *membranarum*) sive ei jus hauriendi, et ad-eundi cessum sit, utrumque habet: sive tantum hauriendi, inesse

et aditum, sive tantum adeundi ad fontem, inesse et haustum. Hæc de haustu et fonte privato.—L. 3, § 3, ff. de serv. præd. rust.

(*e*) *Senhouse v. Christian*, 1 T. R. 560.

contemplation of the parties at the time of making the grant" (*f*).

Thus, too, in *Gerrard v. Cooke* (*g*), where the grant was made of a piece of land, as a foot or causeway, with "all other liberties, powers, and authorities incident or appurtenant, needful or necessary, to the use, occupation, or enjoyment of the said road, way, or passage," it was held, that the grantee had a right to put a piece of flag-stone upon a part of the land in front of a door opened by him from his house, it being proved that it was usual to put down such flag-stones before doorways, and that the doorway in question could not have been so conveniently used without it (*h*).

According to *Dand v. Kingscote* (*i*), the grantee of a mine is entitled to a wayleave "reasonably sufficient" to enable the grantee to get the coals (*k*).

(*f*) In an early case, 6 Edw. 4, it was held, that a man was not justified to enter for the purpose of repairing unless the way was altogether impassable; it was not sufficient that it could not be used so conveniently as before; and on the inconvenience to the party entitled to the way being urged, and that he would be without remedy, *Suit*, J., said, "If he went that way before in his shoes, let him now pluck on his boots."—Cited 2 Doug. 747, 4th ed. This, however, is clearly not law.

(*g*) 2 Bos. & Pul. N. R. 109.

(*h*) *Duncombe v. Randall*, Hetley, 32 or 34; *Brown v. Best*, 1 Wilson, 171; *Weld v. Hornby*, 7 East, 195.

(*i*) 6 M. & W. 198.

[(*k*) See also *Rogers v. Taylor*,

1 H. & N. 706; and page 361, ante, and the cases there referred to, and at page 365, as to the limitation of the extent of such rights. The question how far such rights may be extended by grant or user is not quite settled; for although the House of Lords in *Rorbotham v. Wilson*, 8 H. of L. 360, repudiated the doctrine (supposed to be involved in the judgment in *Hilton v. Earl Granville*, 5 Q. B. 730), that a grant of the easement of the right to work mines, without leaving support and so to destroy the surface, would be invalid; and although the Court of Exchequer seems to have been of opinion, in *Carlyon v. Lovering*, that any right in the nature of an easement, which may be made the subject of a valid grant, may be acquired by

Extent of dominant owner's right.

Gerrard v. Cooke.

Extent of dominant owner's right.

Civil law.

[326]

By the civil law, the owner of the dominant tenement had a right to do whatever was requisite to secure to himself the fullest enjoyment of his servitude, so long as he did not impose any additional burthen upon the servient heritage (*l*); and this right extended to the justification of any trespass committed by him and his workmen on any part of the servient heritage, (*loca quæ non servient*;) in the execution of such works as were necessary for the enjoyment of the servitude (*m*); and the owner of the servient tenement was prevented from doing on the land, not only anything immediately injurious to the easement, but anything which, by obstructing the incidental right of repair, would indirectly be productive of the same consequence: in addition to which, in the case of a water-course, the servient tenement was expressly subjected to the obligation of leaving a passage for the nearest access of the owner of the dominant tenement and his workmen, and also a sufficient space on each side of the stream for depositing the necessary materials (*n*).

user; the Court of Queen's Bench is said in a recent case, *Blackett v. Bradley*, 1 B. & S. 940, to have declined to act upon the combined effect of these authorities, in opposition to *Hilton v. Earl Granville*.^{*} See also ante, pp. 4 and 20, in notis.]

(*l*) Quintus Mucius scribit, cum iter aquæ vel quotidianæ, vel æstivæ, vel quæ intervalla longiora habeat, per alienum fundum erit, (licere) fistulam suam vel fictilem, vel cujuslibet generis in rivo po-

nere, quæ aquam latius exprimeret; *et quod vellet*, in rivo facere licere, *dum* ne domino prædii aquagium deterius faceret. —L. 15, ff. de serv. præd. rust.

(*m*) Sed et depressurum vel adlevaturum rivum, per quem aquam jure duci potestatem habes; nisi si, ne id faceres, cautum sit. —L. 11, com. præd.

(*n*) Refectionis gratiâ, accedendi ad ea loca, quæ non serviant, facultas tributa est his, quibus servitus debetur: qua tamen ac-

^{*} See also *Wakefield v. Duke of Buccleuch*, L. R., 4 Eq. 613; 4 H. Lds. 377.

So, too, if the easement were a right of way, which could not be enjoyed without the construction of works (opere facto), the grant carried with it a right to dig and lay materials upon the soil (*n*); or if the position of the servient land were higher than the house to which the right was granted, and no level passage existed across the land, to cut steps or slopes in the soil for the more convenient use of the easement, provided no greater injury were committed than was necessary for [327] the enjoyment of the right of way (*o*).

Extent of dominant owner's right.

But in doing these works for the enjoyment of an easement, the owner of the dominant tenement must not do anything to alter the accustomed mode of enjoyment in such a manner as to impose a greater burthen upon the servient tenement.

No unnecessary damage to be done to servient tenement.

"I agree with the proposition," said *Rooke, J.*, in the case of *Gerrard v. Cooke*, "that the grantee may use the way in the manner which is most convenient to himself, if he does not thereby produce inconvenience to the grantor;" a position with which *Chambre, J.*,

cedere eis sit necesse: nisi in cessione servitutis nominatim præfinitum sit, quâ accederetur; et ideo nec secundum rivum, nec supra eum, si forte sub terrâ aqua ducatur, locum religiosum dominus soli facere potest, ne servitus intcreat; et id verum est.—*Ibid.*

Si prope tuum fundum jus est mihi aquam vivo ducere, tacita hæc jure sequuntur—ut reficere mihi rivum liceat: ut adire, quâ proximo possem ad reficiendum cum ego, fabrique mei: item, ut spatium relinquat mihi dominus fundi, quo, dextrâ et sinistrâ, ad rivum adeam, et quo terram, li-

num, lapidem, arenam, calcem jacere possim.—*Ibidem*, § 1.

(*n*) Si iter legatum sit, quâ, nisi opere facto, iri non possit, licere fodiendo, substruendo, iter facere, *Proculus ait*.—L. 10, ff. de serv.

(*o*) Si domo mea altior area tua esset, tuque mihi per arcem tuam in domum meam ire agere cessisti, nec ex plano aditus ad domum meam per arcem tuam esset, vel gradus, vel clivos, propius januam meam jure facere possum; dum ne quid ultra, quam quod necesse est, itineris causâ demoliar.—L. 20, § 1, ff. de serv. præd. urb.

No unnecessary damage to be done to servanttenement.

Bracton.

agreed, observing, "if any injury had been sustained by the grantor, it might make a difference."

"Reficere autem est," says Bracton, "id quod corruptum est in pristinum statum reformare. Ei vero permittitur reficere et purgare rivum qui jus habet servitutis, et qui aquæ ducendæ causâ id fecit. In pristinum statum dico, quia si quis rivum deprimit vel attollit, dilatat vel extendit, operit apertum vel quâ per excessum delinquit" (*p*).

"Sed non potest quis sub specie refectionis deterius aliquid facere, nec altius nec latius nec humilior nec longius aliquid facere" (*q*).

Civil Law.

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So also by the civil law, a party entitled to a right of way could not compel the owner of the land to allow him to repair it with stones (*silice*), unless there was an express stipulation to that effect. "Sed de refectione viæ et interdicto uti possumus, quod de itinere actiueque reficiendo competit; non tamen, si *silice* quis sternere velit: nisi nominatim id convenit" (*r*).

In like manner, a party having the right of receiving water through a pipe could not substitute for it a stone conduit. "Rectè placuit, non aliàs per lapidem aquam duci posse, nisi hoc in servitute constituendâ comprehensum sit; non enim consuetudinis est, ut qui aquam habeat, per lapidem statum ducat: illa autem, quæ ferè in consuetudine esse solent, ut per fistulas aqua ducatur, etiam si nihil sit comprehensum in servitute constituendâ, fieri possunt; ita tamen, ut nullum damnum domino fundi ex his detur" (*s*). But he had a right even without any express stipulation to repair it in the

(*p*) Lib. 4, ff. 233 a.

(*q*) Lib. 4, ff. 234 b.

(*r*) L. 4, § 5, ff. si serv. vind.

(*s*) L. 17, § 1, ff. De aquâ et aq. pl. arc.

ordinary way, provided he thereby did no unnecessary harm to the owner of the land.

No unnecessary damage to be done to servient tenement:

In entering upon the neighbouring soil for the purpose of doing these necessary works, the owner of the dominant tenement was bound not only to exercise ordinary care and skill, but also to repair, as far as he could, whatever damage his labours might have caused to the servient tenement (*t*). This, however, must not be confounded with damage to the servient tenement naturally arising from the easement itself, as where a stream of water overflowed its banks in consequence of rain or the rising of a new spring in it (*u*).

Dominant owner bound to repair damage done.

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As, however, these ancillary servitudes were only conferred for the full enjoyment of the primary servitude, they ceased upon its extinction (*x*).

As a general rule, the right of repair extended no farther than to restore the servitude to its original condition (*ad pristinam formam* (*y*)); though such restored servitude need not be to specifically the same state; thus a bridge might be built, if the way were otherwise impassable (*z*).

Restoration of servitude to its original condition.

(*t*) Si fistulæ per quas aquam ducas, adibus meis applicatæ, damnum mihi dent, in factum actio mihi competit; sed et damni infecti stipulari à te potero.—L. 18, ff. de serv. præd. urb.

(*u*) Servitus naturaliter, non manufacto, lædere potest fundum servientem; quemadmodum si imbri crescat aqua in rivo, aut ex agris in eum confluat, aut aquæ fons secundum rivum, vel in eo ipso inventus postea fuerit.—L. 20, § 1, ff. de serv. præd. rust.

(*x*) Labco ait: si is, qui haustum habet, per tempus, quo servi-

tus amittitur, ierit ad fontem, nec aquam hauserit, iter quoque enim amississe.—L. 17, ff. quemad. serv. amit.

(*y*) Reficere sic accipimus, ad pristinam formam iter et actum reducere; hoc est, ne quis dilatet, aut producat, aut deprimat, aut exaggeret—et aliud est enim reficere, longe aliud facere.—L. 3, s. 15, ff. de itinere.

(*z*) Apud Labconem quaeritur—si pontem quis novum velit facere viæ muniendæ causâ: an ei permittatur? et ait permittendum, quasi pars sit refectionis hujus-

No unneces-
sary damage to
be done to ser-
vient tenement.

It might be provided by express stipulation, that the owner of the dominant tenement should not have any right to repair, or only to a certain extent (*a*).

[The incidents or secondary easements discussed in this chapter form, in most cases, one entire right with the principal easement (*b*).]

modi munitio. Et ego puto veram Labeonis sententiam, si modo sine hoc commeari non possit.—Ibid. s. 16.

(*a*) Fieri autem potest, ut qui jus eundi habeat et agendi, reficiendi jus non habeat; quia in ser-

vitute constituendâ cautum sit, ne ei reficiendi jus sit; aut sic, ut si velit reficere, usque ad certum modum reficiendi jus sit.—Ibid. § 14.

[(*b*) *Peter v. Daniel*, 5 C. B. 568; *Beeston v. Weate*, 5 El. & Bl. 986.]

CHAPTER III.

EXTENT AND MODE OF ENJOYMENT.

AS every easement is a restriction upon the rights of property of the owner of the servient tenement, no alteration can be made in the mode of enjoyment by the owner of the dominant heritage, the effect of which will be to increase such restriction. Supposing no express grant to exist (*a*), the right must be limited by the amount of enjoyment proved to have been had. .

Dominant owner not to extend his enjoyment.

Thus, it is laid down in Rolle's Abridgment—if A. be seised in fee, and grant to B. a right of way to a certain close, B. cannot use that way to go to other closes without first going to the close specified in the grant (*b*). But it was said that if a defendant justifies under a right of way from D. to Blackacre, if the plaintiff replied that at the time of the trespass the defendant went with his carriages from D. to Blackacre, and thence to a mill, the replication would not support the action, for when he was in Blackacre he might go where he pleased (*c*). But it seems, that if a

[(*a*) In the case of express grants, the easement may be such as altogether to exclude the owner of the servient tenement from participation, as where the exclusive use of a drain is granted; see *Lee v. Stevenson*, El. Bl. & El. 512; and see *Rhodes v. Bullard*, 7 East, 116, for an instance of a right in the nature of an easement deter-

minable on the removal of the subject-matter.]

(*b*) *Chemin private*, A. (Comment poet estre use), pl. 1, *Hodder v. Holman*; nor even then, see 4 M. & W. 774.

(*c*) *Ibidem*, pl. 2, *Saunders v. Mose*. Vide *Stott v. Stott*, 16 East, 343.

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extend his en-
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man have a way for carriages, from D. to Blackacre, over my close, and afterwards he purchase land adjoining to Blackacre, he cannot use the aforesaid way with carriages to the land adjoining, though he go first to Blackacre, and from thence to the land adjoining, for this might be greatly prejudicial to my close; but it seems, that if I wish to help myself I ought to show this special matter, *and that he uses it for the land adjoining*" (d).

In the later case of *Lawton v. Ward* (e), the defendant justified under a right of way, for carts and carriages, to a close called C. The plaintiff replied, that the defendant drove the carts to C., and also further to D. The plaintiff upon demurrer to the rejoinder had judgment; and it was resolved, "that the defendant had not pursued his prescription, for the prescription is to go to C.; that when he goes to C., and farther to D., he has not authority to do it." And *Powell, J.*, jun., said, "That the difference is, where he goes further, to a mill or a bridge, there it may be good; for by the same reason, if the defendant purchases 1,000 closes, he may go to them all, which would be very prejudicial to the plaintiff." And for authorities they relied upon 1 Rolle, Abr. 391, pl. 3; 1 Mod. 190; * 3 Keble, 348 (f).†

(d) *Chemin private*, pl. 3, S. C.

(e) 1 Lord Raymond, 75; S. C. 1 Lutwyche, 111, nom. *Laughton v. Ward*.

(f) See per *Parke, B.*, in *Colchester v. Roberts*, 4 M. & W. 774, acc.; and see *Cowling v. Higgin-*

son, 4 M. & W. 245; *Dand v. Kingscote*, 6 M. & W. 174; see also *Allen v. Gomme*, 11 A. & E. 759; alteration of building on dominant tenement to which there was a way; and ante, "Ways."

* *Howell v. King*.

† It is a question for the jury whether the way has been bona fide

So, *Senhouse v. Christian*, where a right of way was granted, with liberty to make causeways, &c., it was held that no right was conferred upon the party to make a transverse way, which would have imposed an additional burthen upon the servient tenement (*g*).*

Dominant
owner not to
extend his en-
joyment.

[The question is in all cases one of construction, whether the grant is for a limited purpose or a general grant (*h*).] †

(*g*) 1 T. R. 560.

[(*h*) In *Henning v. Burnet*, 8 Exch. 194, *Parke*, B., laid down that a general grant of a right of way to Greenacre would mean for whatever purpose the field was used, unless limited by the context.

In the same case the learned judge said, if a right of way be granted for the purpose of being

used as a way to a cottage, and the cottage is changed into a tan-yard, the right of way ceases; and in *The South Metropolitan Company v. Eden*, 16 C. B. 57, *Jervis*, C. J., said, "If I grant a man a way to a cottage which consists of one room, I know the extent of the liberty I grant, and my grant would not justify the grantee in

used only as a way to the land to which it is appurtenant. In *Skull v. Glenister* (16 C. B., N. S. 81), the defendant had a right of way to Wheeler's Close, and used it as a place of deposit for building materials to be used on his land adjoining. The question left to the jury was, whether the defendant used the way as a way to Wheeler's Close, or used it colourably for the purpose of getting to his other land. The jury found for the plaintiff, and the finding was upheld. In *Williams v. James* (Y. R., 2 C. P. 577), the defendant had a right of way to the nine-acre field, and having stacked upon it as well the hay of that field as the hay produced on other land, used the way for carting away both quantities of hay; and the jury having found that the stacking of the hay was done honestly, and not to get the way further on, it was held that there was no excess in the user. (See also *Ardley v. Guardians of St. Pancras*, 5 W. N. 203; 39 L. J., Ch. 871.)

* Where liberty was granted to make a road through a field, the grantee was not authorized to make a cutting and carry away the soil, there being no practical difficulty in making the road over and not through a knoll which existed in the field. (*Fothergill v. Richards*, 10 W. N. 108.)

† On a conveyance of land with all water-courses belonging or appertaining, or with the same held, used or enjoyed, it was held, that the

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dominant tene-
ment.

If a man increases the size of an ancient window, it is clear that he has no title to the additional quantity of light thus received by him (*i*): how far such alteration operates to defeat the right altogether will be hereafter considered (*h*).*

claiming to use the way to gain access to a town he might build at the extremity of it." See upon the principles applicable to this subject, the observations of *Parke*, B., in *Colchester v. Roberts*, 4 M. & W. 774, as to ways—*Tobin v. Stowell*, 9 Moore, P. C. 79; *Miner v. Gilmour*, 12 Moore, P. C. 156; *Northam v. Hurley*, 1 E. & B. 665, and *Wurdle v. Brocklehurst*,

1 E. & E. 1058, as to waters—also *Newby v. Harrison*, 1 John. & H. 393, and *Hawkins v. Carbins*, 24 L. J., N. S., Exch. 44.]

[(*i*) But he may obtain increase of light by altering his mode of framing and glazing; *Turner v. Spooner*, 1 Drew. & Sm. 467; 7 Jur., N. S. 1068; and see post.]

(*h*) Post, Part III. Chap. II. Sect. 3.

right to a water-course passed, even if it was not necessary but only convenient to the land. (*Watts v. Kelson*, L. R., 6 Ch. 175.)

An exception does not enlarge the grant. Thus, where there was a demise of a mill and the stream of water flowing in the leet, except so much as should be sufficient for the supply of the persons the lessor had already contracted with, or should thereafter contract, to supply, provided that such quantity should be left as should be sufficient to supply the mill for twelve hours a day, it was held that the grant was only of the mill with the use of the stream as it then was, and that the proviso only applied to the exception, and did not oblige the lessor to supply the mill with water for twelve hours a day. (*Blatchford v. Mayor of Plymouth*, 3 Bing. N. C. 691.)

* A covenant that the owners and occupiers of the lands conveyed should have the full use and enjoyment of all roads, in as full, free, complete and absolute a manner as if the same were public roads, entitles them not only to the use of the roads for the purpose of transit, or for the purposes for which public roads could be used at the date of the deed, but also to rights subsequently granted over public roads, as to open them for the purpose of conveying gas to the houses of the occupiers. (*Selby v. Crystal Palace District Gas Company*, 30 Beav. 606; 8 Jur., N. S. 422, 880; 31 L. J., Ch. 595.) *Wood v. Stourbridge Railway Company* (16 C. B., N. S. 222) is an authority for giving an enlarged construction to a grant of a right of way with respect to its extent. In *Midgley v. Richmond* (14 M. & W. 595), confirmed by *Hedley v. Fenrick* (3 H. & C. 349), general words, reserving a way-

So, too, by the civil law, a party entitled to a flow of water, for irrigation or other purposes, was not allowed

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leave to the Bishop of Durham for coals, &c., gotten out of any lands, were restrained by the context to lands belonging to the see.

Where the grant of a way is general and unrestricted, the grantee may use the way for going to his land for any purpose whatever. It comprehends any use to which he may afterwards apply his land ; and of this nature is a level crossing granted by a railway company between two severed portions of an estate. (*United Land Company v. Great Eastern Railway Company*, L. R., 17 Eq. 158 ; 10 Ch. 586.)

But where the grant is to a particular building or land, the right is restricted to a reasonable use with reference to the condition of the dominant tenement at the time of the grant. Thus, where there was a grant of drainage to a private mansion house and grounds, which was then adapted for about twenty-five inmates, and the grantee afterwards altered the drains and enlarged the house, and converted it into a lunatic asylum in which nearly 150 persons lived, and sent all their drainage to the servient tenement, an injunction was granted. (*Wood v. Saunders*, L. R., 10 Ch. 582.)

Where by lease a right of way was granted to a manufactory, and it was afterwards turned into a place of public entertainment, *Bacon*, V.-C., held that the grantor had no right to enlarge the right of way over the passage beyond the extent of user at the date of the lease. (*Collins v. Slade*, 9 W. N. 205.)

In *Scot's Mines Company v. Leadhill's Mines Company* (31 L. T. 34), both parties held mines under the Earl of Hopetoun. There was a reservation in the plaintiffs' lease to the earl and his tenants of the use of all shafts, sumpts, cuts, levels, drifts and other way-gates made or to be made, with power of sinking and driving within the plaintiffs' grounds for the convenience of his other works, in so far as the same could be done without incommoding the plaintiffs, and the earl repairing all damage. It was held that the plaintiffs were under a servitude to receive all water conveyed in the ordinary course of mining by the defendants, and that the words "without incommoding," &c., did not limit the use of the shaft in working the old mines, but was confined to the new works, being the last antecedent. Lord *Campbell* said, "The occupiers of the mines on the higher level are only empowered to do within their own limits what might be done prudently in the ordinary course of mining ; they certainly would not be justified in incautiously tapping a tarn, and so inundating the country below."

A reservation of the free running of water and soil entitles the grantor to the passage of all water lawfully on his land, though it did not arise there, and to such products as are the product of the ordinary

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to impart the use of it to his neighbours (*l*); nor, as it appears, even if he himself purchased the adjoining lands, would he be entitled to take a larger quantity of water than before for the use of his estate (*m*); for in determining the amount of a servitude, regard is to be had to the accustomed mode of enjoyment rather than the necessity of the dominant tenement. A party having acquired the easement *tigni immittendi*, could not increase the number of beams which his neighbour was bound to support, and might be compelled to remove any additional ones inserted by him (*n*).

Pulling down
for purpose of
repair.

The pulling down of a house for the purpose of repair does not, by the law of England, even when construed most strictly, cause the loss of any easement attached to it, if it be accompanied by an intention, acted upon within a reasonable time, of rebuilding it (*o*).

By the civil law, the mere destruction either of the

(*l*) *Ex meo aquæ ductu, Labco scribit, cuilibet posse me vicino commodare; Proculus contra, ut ne in meam partem fundi aliam, quam ad quam servitus adquisita sit, uti ea possit. Proculi sententia verior est.*—L. 24, ff. de serv. præd. rust.

(*m*) *Non modus prædiorum, sed servitus aquæ ducendæ terminum facit.*—C. 12, ff. de serv. et aquâ.

(*n*) *Si, cum meus proprius esset paries, passus sim (te) immittere tigna, quæ antea habueris, si nova velis immittere, prohiberi à me potes; imo etiam agere tecum*

potero, ut ea, quæ nova immiseris tollas.—L. 14, ff. si serv. vind.

(*o*) *Luttrell's case*, 4 Rep. 86; [The reason is obvious, viz., that it is incidental to all houses to be repaired and at some time to be rebuilt, and the right when acquired is acquired for the tenement with such incidents. If this were not so, no prescriptive right could be acquired in respect of a messuago or any artificial structure.] See also *Moore v. Ranson*, post, "Extinguishment of Easements."

use of land for habitation, such as night-soil and sewage, but not to send through the drain the offensive refuse of a manufactory. (*Chadwick v. Marsden*, L. R., 2 Ex. 285.)

dominant or servient tenement extinguished a servitude, though it was held to revive if the house was rebuilt on the same site and of the same dimensions as before (*p*).

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of dominant-
tenement.

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A mere alteration in the mode of enjoyment, as the change of a mill from a fulling to a grist mill, or the like (*q*), whereby no injury is caused to the servient heritage, or a trifling alteration in the course of a water-course (*r*), does not destroy the right.*

By the civil law, the owner of the dominant tenement might make any alteration in the mode of enjoying his servitude, provided he thereby imposed no additional burthen on the servient heritage; he might make the condition of his neighbour better, but not worse (*s*).

This, however, must be taken with some qualification when applied to the case of natural easements. The owner of land in which a spring took its rise, or upon which rain fell, was allowed, for the necessary purposes of cultivation, a reasonable degree of liberty in changing the course of the water running to his neighbour's land, though he might thereby make the servitude more burdensome.

“It seldom happens,” says Pardessus (*t*), “that run- Pardessus.

(*p*) Si sublatum sit ædificium, ex quo stillicidium cadit, ut eadem specie et qualitate reponatur, utilitas exigit, ut idem intelligatur: nam alioquin, si quid strictius interpretetur, aliud est, quod sequenti loco ponitur; et ideo, sublato ædificio, ususfructus interit, quamvis arca pars est ædificii.—

L. 20, § 2, ff. de serv. præd. urb.

(*q*) *Luttrell's case*, 4 Rep. 86.

(*r*) *Hall v. Swift*, 6 Scott, 167; S. C. 4 Bing. N. C. 381.

(*s*) L. 20, § 5, ff. de serv. præd. urb. post.

(*t*) *Traité des Servitudes*, § 82 (7th ed. 113).

* An easement to discharge polluted water from a paper-mill into a stream extends to a new material used in the manufacture of paper, if the material is proper for the purpose, and does not increase the amount of pollution as against the servient tenement to any substantial or tangible degree. (*Baxendale v. M'Murray*, L. R., 2 Ch. Ap. 790.)

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ning water, which takes its rise on an estate, or even the rain water which falls upon it, is absorbed there and escapes without any apparent issue. Some mode of discharge is then necessary; and it is in the obligation to suffer this discharge that, by the Code (*u*), consists the subjection of the inferior heritage towards those whose lands are more elevated, to receive the waters which flow from them naturally. Even if this discharge should be prejudicial to the plantations of the inferior heritage, or should prevent its cultivation by bringing down upon it stones and sand, no action could be maintained for the damage so done. No one is responsible for the effects of nature (*x*). The case even cannot be excepted, where for more than thirty years (*y*), whether from causes purely natural, such as the scarcity of water, whether from the sole act of the proprietor, as, for example, if he had kept the water, or, in any other manner which offered a large surface for evaporation, the spring should have had no issue upon the inferior heritage. As such rights as are imposed by the general law, and the nature of things, are not lost by mere non-user, whatever time may have elapsed."

"The same article adds, that 'this obligation applies only to the waters which flow naturally without any act of man;' those which come either from springs or from rain falling directly on the heritage, or even by the effect of the natural disposition of the places, are the only ones to which this expression of the law can be applied. He who, for whatsoever use it may be, shall employ in his house, or on his heritage, water which he drew from a

(*u*) Code Civil, Art. 640.

§ 1, ff. de aq. et aq. pl. arc.

(*x*) *Quod si naturâ aqua noceret
câ actione non continentur.*—L. 1,

(*y*) That is to say, the period of
prescription by the French law.

well, reservoir, &c., cannot discharge it (*faire couler*) upon the inferior heritage without the permission of the proprietor. A man who devotes his heritage to a species of cultivation requiring frequent irrigation, ought to make at the extremities of his land ditches to receive the surplus water which, without this precaution, might percolate to his neighbour's land. The latter might with reason contend that such a process is not natural, and would not have taken place but for the act of man (*z*). Conformably to this principle, the Code (*a*) does not permit the discharge of water from a roof or the neighbouring land, even though it might happen that, were the site of the building unoccupied (*vague*), the rain which fell there would by a natural servitude flow into the neighbouring land."

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of dominant
tenement.

Pardessus.

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"It would appear, however, to be a false application of these principles to consider as the act of man the fall of water from a fountain newly opened, even though the opening has been caused by the labour of the proprietor of the land. If any contest arose as to the obligation to receive the water, the question for the tribunals to decide would be—upon which heritage the water would most naturally fall."

"It is not, however, to be understood that because the flow of water must not be caused by the act of man, that, therefore, the proprietor who transmits water to the inferior heritage is not permitted to do anything on his own land, that he is condemned to abandon it to a perpetual sterility, or never vary the course of cultiva-

(*z*) *Idemque ait, et ex superiore in inferiora non aquam, non quid aliud immitti licet; in suo enim alii hactenus facere licet, quatenus*

nihil in alienum immittat.—L. 8, § 5, ff. si serv. vind.

(*a*) Art. 681.

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of dominant
tenement.

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tion, simply because such acts would produce some change in the manner of discharging the water. The law could not have had this intention; it prohibits only the emission into the inferior heritage of the waters which would never have fallen there by the disposition of the places alone. It neither would nor could refuse to the superior proprietor the right to aid and direct the natural flow" (*b*).

American
decisions.

In the American Courts questions have frequently arisen upon the conflicting claims of different owners of land adjacent to a stream, where no exclusive right has been acquired by any party.

"The proprietor of a water-course," says Mr. Justice *Story*, "has a right to avail himself of its momentum, as a power which may be turned to beneficial purposes, and he may make such a reasonable use of the water itself for domestic purposes, for watering cattle, or even irrigation, provided it is not unreasonably detained or essentially diminished; for although, by the case of *Weston v. Alden* (*c*), the right of irrigation might seem

(*b*) Hæc autem actio locum habet in damno nondum facto, opere tamen jam facto; hoc est, de eo opere, ex quo damnum timetur; totiensque locum habet, quotiens manu facto opere agro aqua nocitura est; id est, cum quis manu fecerit, quo aliter flucret, quam naturâ soleret; si forte immittendo eam aut majorem fecerit, aut citatiorem, aut vehementiorem; aut si comprimendo redundare effecit; quod si naturâ aqua noceret, ea actione non continentur.—L. 1, § 1, ff. de aq. et aq. pl. arc.

De eo opere, quod agri colendi causâ aratro factum sit, Quintus

Mucius ait, non competere hanc actionem. Trebatius autem, non quod agri, sed quod frumenti duntaxat querendi causâ aratro factum sit, solum exceptit.—L. 1, § 3. Ibid.

Sed et fossas agrorum siccandarum causâ factas, Mucius ait fundi colendi causâ fieri; non tamen (oportere) corrivandæ aquæ causâ fieri; sic enim debere quem meliorem agrum suum facere, ne vicini deteriore faciat.—L. 1, § 4. Ibid. Vide etiam §§ 5, 6, 7, 8, 9, 10, 11. Ibid.

(*c*) 7 Mass. 136.

to be general and unlimited, yet subsequent cases have restrained it consistently with the enjoyment of the common bounty of nature by other proprietors, through whose land a stream had been accustomed to flow, and the qualification of the right by these decisions is in accordance with the common law" (*d*). American
decisions.
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The general principle governing this point is thus stated by Chancellor Kent in his learned Commentaries (*e*):—

“Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple use for it while it passes along. *Aqua currit et debet currere*, is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it.”

“This is the clear and settled general doctrine on the

(*d*) *Tyler v. Wilkinson*, 4 Mason, N. S. R. 397.

(*e*) 3 Kent, Comm. 439.

American
decisions.

subject, and all the difficulty that arises consists in the application."

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"The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to the subsequent use of the same water. Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water."

"All that the law requires of the party, by and over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect, the application of the water by the proprietors below on the stream. He must not shut the gates of his dam, and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbour. Pothier lays down the rule very strictly, 'that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below.' But this must not be construed literally,

for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned; otherwise rivers and streams of water would become entirely useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law:—‘*Sic enim debere quem meliorem agrum suum facere, ne vicini deteriore faciat*’” (*f*).*

American
decisions,

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If a severance of the dominant tenement takes place, all its easements, which are attached to the tenement, and not to the person of the owner, will attach to the severed portions (*g*); if a house be divided into two distinct tenements, each of these will retain the original right to have the windows unobstructed.

Easements
severed on
severance of
dominant
tenement.

It is obvious, however, that, by such severance, no right is acquired to impose an additional burthen on the servient tenement. However numerous the occupants of the severed tenement may be, they must still confine themselves within the limits of the right existing at the time of severance.

The civil law distinctly recognized the doctrine, that the dominant tenement continued to enjoy its servitudes, notwithstanding a severance (*h*).

[(*f*) The English law on this subject has been already discussed, ante, p. 219, et seq.]

(*g*) *Tyrringham's case*, 4 Rep. 36 b; *Wyat Wild's case*, 8 Rep. 78 b; *Harris v. Drew*, 2 B. & Ad. 164. [See the judgment of *Bayley, J.*, in *Codling v. Johnson*,

9 B. & C. 934, as to severance of a right of way.]

(*h*) *Si stipulator decesserit pluribus hæredibus relictis, singuli solidam viam petunt.*—L. 17, ff. de serv.

Si prædium tuum mihi serviat, sive ego partis prædii tui dominus

* Washburn on Easements, 265, et seq.

Duty of servient owner.

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As it is the duty of the owner of the dominant tenement not to do any act which imposes an additional burthen upon the owner of the servient tenement, so the latter must do no act which interferes with the exercise of the right already acquired, or those secondary easements which are requisite for its full and free enjoyment (*i*). If his wall be liable to an easement of support to a neighbouring house, he must not (except for the purpose of necessary repair) pull down, or otherwise weaken the wall, so as to make it incapable of rendering the requisite degree of support (*h*):—he must not plough up a foot-path across his field (*l*), or drive stakes to obstruct a water-course flowing to a mill (*m*), even though the stream be incapable of use at the place where the obstruction is made from the want of cleansing (*n*).

It is even said by *Jones, J.*, in *James v. Hayward* (*o*), that he must not erect a gate across a foot-way running over his land.*

esse cœpero, sive tu mei, per partes servitus retinetur, licet ab initio per partes adquiri non poterit.—L. 8, § 1, ff. de serv.

(*i*) Bracton, lib. 4, ff. 233, post.

Si totus ager itineri, aut actui servit, dominus in eo agro nihil facere potest, quo servitus impediatur, quæ ita diffusa est, ut omnes glebæ serviant.—L. 13, § 1, ff. de

serv. præd. rust.

(*h*) *Brown v. Windsor*, 1 Cr. & J. 20.

(*l*) 2 Rolle, Abr. Nusaus, G. pl. 1.

(*m*) Ibid. pl. 8, 9.

(*n*) *Bower v. Hill*, 1 Bing. N. C. 555.

(*o*) Sir W. Jones, R. 221.

* A man who grants a way through his land cannot build a wall at the end of it, so as to prevent the grantee from going beyond. (*Phillips v. Tręby*, 8 Jur., N. S. 711, 999; 3 Giff. 632.)

After a grant that a stream shall flow in a free and uninterrupted course through a defined channel, the water-course cannot be diverted by a person claiming under the grantor, though there be no loss of water to the grantee. (*Northam v. Hurley*, 1 E. & B. 665.)

A grant of all streams of water that might be found in certain closes

There is a deficiency of authority upon the question—whether the owner of the servient tenement is considered as the author of an obstruction to the easement arising entirely from the growth of the roots or branches of trees standing on his soil, and therefore liable for the consequences.

Duty of
servient owner.
Whether liable
for obstruction
caused by roots
of trees, &c.

In the recent case of *Hull v. Swift* (*p*) an action was brought for disturbing the plaintiff in the enjoyment of a water-course. “The only positive obstruction by the act of the defendant that appeared was, that, upon two or three occasions, he had directed his servants to place a turf at the embouchure of a stream, for the purpose of irrigating his field, the ultimate stoppage being occasioned by the intrusion of the roots of a tree growing upon the defendant’s land, whose fibres grew into and filled up the channel.” The jury found that the defendant had “obstructed the plaintiff in the enjoyment of the water;” and the court, after consulting the learned judge who tried the cause, and who reported, “that the facts had been fully and fairly left to the jury, and that he was satisfied with their finding,” refused to disturb the verdict.

Hall v. Swift.

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(*p*) 6 Scott, 167; 4 Bing. N. C. 381.

prevented the grantor, and those claiming under him, from working mines so as to divert underground water from wells in the closes. (*Whitehead v. Parks*, 2 H. & N. 870.)

The owner of the dominant tenement may do any act thereon which does not interfere with the easement. Thus, a grant of a right of way over a certain width of land does not entitle the grantee to object to an erection, such as a porte cochère, by his grantor, on the land devoted to the way, which is no impediment to the exercise of his right. (*Clifford v. Hoare*, L. R., 9 C. P. 362.)

Where there is a way of necessity and the grantor erects a building on the land, and there remains, after the erection, such a way as the grantee would have been entitled to the day after the grant, the way is not interfered with. (*Gayford v. Moffatt*, L. R., 4 Ch. 136.)

Duty of
servient owner

By the civil
law he was
liable.

By the civil law, the servient owner was not allowed to plant trees, or do any other act, so as to obstruct the passage of light to a window enjoying the servitude—“ne luminibus officiatur” (*q*); and the further progress of a work already commenced might be stopped on the same grounds (*r*). To render a man liable to an action for the discharge of rain-water upon his neighbour’s land, such water must have been diverted from its natural course by some act of man (*opus manufactum*); and this consequence was held to ensue when the diversion was caused by planting a bed of willows (*s*).

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Semble also
liable by the
law of Eng-
land.

The real question appears to be, whether, in contemplation of law, the damage is the result of the act of man in planting the trees, however long the time may be before they become injurious; or whether it arises solely from the act of nature. In the latter case it is clear no right of action would accrue: “*Actus Dei nemini facit injuriam* :” in the former case he would, of course, be liable; and it would appear, that, in this case, he is liable—for every consequence is considered to result from an act of man, which proceeds from an act of volition on his part, and the operation of the ordinary natural causes: the growth of a tree, when planted, is no more the effect of natural causes alone, than that fire should communicate from one field to another by an

(*q*) Si arborem ponat, ut luminī officiat, æque dicendum erit, contra impositam servitutem eum facere—nam et arbor efficit, quo minus cœli videri possit.—L. 17, ff. de serv. præd. urb.

(*r*) Quodcumque igitur faciat ad luminis impedimentum, prohiberi potest, si servitus debetur:

opusque ei novum nunciari potest, si modo sic faciat, ut luminī noceat.—L. 15, Ibid.

(*s*) Sed apud Servii auctores relatum est, si quis salicta posuerit, et ob hoc aqua restagnaret, ‘aquæ pluvie arcendæ’ agi posse, si ea aqua vicino noceret.—L. 1, § 6, ff. de aq. et aq. pluv. arc.

ordinary wind; or that a stone, when flung, should strike an object at which it is aimed.

Duty of servient owner.

The servient owner has likewise his rights: the dominant owner's encroachments can be justified only to the extent of his easement; as to all beyond that, his acts constitute a private nuisance for which an action may be maintained (*t*). With regard, therefore, to all artificial easements, he is bound to keep his works in such a state, that they shall cause no inconvenience to the neighbour beyond that warranted by the easement; and if he neglects this, he brings himself within the ordinary case of a violation of the rule, "*Sic utere tuo ut alienum non laedas*," and is of course liable to an action.

Rights of servient owner.

The servient owner has in this, as in other cases of nuisance, the privilege of taking the remedy into his own hands. The reformation of a nuisance, as appears from Bracton, is not confined to the case of prostration, but the party aggrieved by a nuisance arising from the want of repair of a neighbouring edifice, may himself do the necessary acts, "*vel relevari vel reparari si querens ad hoc sufficiat*" (*u*).*

To do necessary repairs.

By the civil law it was expressly provided that the servient owner might compel the dominant to keep in repair his artificial works (*x*). In the case of natural

Civil law. [343]

[(*t*) As to his remedy by obstruction, see ante. 322, note (*n*), and post, Part III. Chap. II. Sect. 3.]

abate a nuisance [as against the alienee of the person who has caused it?]

(*u*) Lib. 4, ff. 233 a. [See *Jones v. Williams*, 11 M. & W. 176, as to the right to enter to

(*x*) *Aggerem, qui in fundo vicini erat, vis aquæ deiecit: per quod effectum est, ut aqua pluvia*

* If the way is obstructed by the grantor, the grantee, during the obstruction, has a right to deviate over other land of the grantor. The right extends to a purchaser from the grantor with notice, and will be enforced by injunction. (*Selby v. Nettleford*, L. R., 9 Ch. 111.)

Rights of servient owner.

servitudes no action lay for any change produced by causes entirely independent of the act of man, and each party was in general compelled to submit to the inconvenience or entitled to the benefit of all changes effected by the hand of nature in the condition of his tenement. If, however, a reparation could be effected which in no respect deteriorated the condition of the dominant, while it rendered less onerous that of the servient owner, it seems that the latter might himself perform the necessary repairs: thus, if by accretions of mud or other natural causes, the flow of the stream became irregular, and consequently injurious to the servient owner, he might enter on the adjoining land and cleanse the stream, provided he thereby did no injury to his neighbour (γ).

mihī noceret. Varus ait, si naturalis agger fuit, non posse mo vicinum cogere 'aquæ pluviae arcendæ' actione, ut eum reponat vel reponi sinat. Idemque putat, et si manufactus fuit, neque memoria ejus exstaret—quod si exstet, putat 'aquæ pluviae arcendæ' actione cum teneri. Labeo autem, si manufactus sit agger, etiamsi memoria ejus non exstat, agi posse, ut reponatur: nam hæc actione neminem cogi posse, ut vicino prosit, sed ne noceat, aut interpellat facientem quod jure facere possit. Quamquam tamen deficiat 'aquæ pluviae arcendæ' actio: attamen opinor utilem actionem vel interdictum mihi competere adversus vicinum, si velim aggerem restituere in agro ejus, qui factus mihi quidem prodesse po-

test, ipsi vero non nociturus est: hæc æquitas suggerit, etsi jure deficiamus.—L. 2, § 5, ff. de aq. et aq. pl. arc.

Trebatius existimat, si de eo opere agatur, quod manufactum sit, omnimodo restituendum id esse ab eo, cum quo agitur: si vero vi fluminis agger deletus sit, aut glarea injecta, aut fossa limo repleta, tunc patientiam duntaxat præstandam.—L. 11, § 6, Ibid.

(γ) Apud Namusam relatum est,—si aqua fluens iter suum stercore obstruxerit, et ex restagnatione superiori agro noceat, posse cum inferiore agi, 'ut sinat purgari'; hanc enim actionem non tantum de operibus esse utilem manufactis, verum etiam in omnibus, quæ non secundum voluntatem sint. Labeo contra Namusam

Where a right of way is granted generally, or arises by implication of law, questions have arisen as to the part of the land over which the way shall be taken— [344] which party is entitled to assign the way—and under what restrictions such right must be exercised. The opinions expressed on these points appear to be somewhat at variance with each other.

Vague grant of easement, how assigned.

It is laid down in *Rolle, Abr. (z)*, “that the grantor shall assign the way (of necessity) where he can best spare it;” while, in a case in *Siderfin (a)*, *Glyn, C. J.*, says, “that the defendant (the grantee) may take a convenient way without permission of the grantor; and if he taketh what is inconvenient, or too much, the law shall adjudge it.”

Expressed opinions at variance.

Mansfield, C. J., in *Morris v. Edgington (b)*, appears to have been of opinion that a party entitled to a way of necessity might take that which was most convenient for the enjoyment of the premises demised to him.

If, however, the right of way has once been assigned, its course cannot be altered by either party without the consent of the other.

“If A. has a way through the land of B., and B. ploughs up the soil where the way was used, and leaves another part of the same close for a way, A. may use the

probat; ait enim naturam agri ipsam a se mutari posse: et ideo, cum per se natura agri fuerit mutata, æquo animo unumquemque ferre debere, sive melior sive deterior ejus conditio facta sit. Idcirco, et si terræ motu, aut tempestatis magnitudine, soli causa mutata sit: neminem cogi posse, ut sinat in pristinam loci condi-

tionem redigi. Sed nos etiam in hunc casum æquitatem admittimus.—L. 2, § 6, *Ibid.*

(z) *Tit. Grants*, 2, pl. 17, vol. 2, p. 60.

(a) *Packer v. Welstead*, 2 Sid. 112.

(b) 3 Taunt. 24. [This subject has been already discussed, p. 148, ante.]

Vague grant of easement, how assigned. ancient tract, and need not go where the way is assigned *de novo*" (c).*

Civil law.

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By the civil law a distinction appears to have existed between those cases in which the servitude, in general terms, was imposed by will, and where it was created by any act *inter vivos*. In the former case, the option of allotting the position and direction of the servitude was with the heir, provided he did nothing to injure the rights of the party to whom the servitude was devised (d); in the latter case, unless the instrument contained some express stipulations in this respect, the grantee was at liberty to select such portion of the servient heritage as was most suitable to him, although, in this case also, certain restrictions were imposed, as that he should not use his servitude to the damage of the grantor's house, gardens, or vineyards (e).

(c) Com. Dig. Chimin, D. (5); Noy, 128.

(d) Si via, iter, actus, aquæductus legetur simpliciter per fundum, facultas est hæredi, per quam partem fundi velit constituere servitutem; si modo nulla captio legatario in servitute sit.—L. 26, ff. de serv. præd. rust.

(e) Si locus, non adjectâ latitudine, nominatus est, per eum qualibet iri poterit. Sin autem prætermisus est, (locus) æque, latitudine non adjectâ, per totum fundum,

una poterit eligi via, duntaxat ejus latitudinis, quæ lege comprehensa est; pro quo ipso, si dubitabitur, arbitri officium invocandum est.—L. 13, § 3, ff. Ibid.

Si cui simpliciter via per fundum cujuspian cedatur, vel relinquatur, in infinito (videlicet per quamlibet ejus partem) ire agere licebit; civiliter modo. Nam quædam in sermone tacitè excipiuntur; non enim per villam ipsam, nec per medias vineas ire agere sinendus est: cum id æque commodè per

* An agreement, that the plaintiff shall have permission to use all roads and ways in and through the defendant's estate, entitles him to a way over all those parts of the defendant's land which, at the time of the agreement, are laid out as roads, and, it seems, over all those parts which shall afterwards be so laid out. (*Phillips v. Treeby*, 8 Jur., N. S. 711, 999; 3 Giff. 632.)

If, however, the party so entitled once made his choice, he was no longer at liberty to select a new direction for the exercise of his servitude (*f*).

Vague grant of easement, how assigned.

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alteram partem facere possit, minore servientis fundi detrimento.—L. 9, ff. de serv.

Sed quæ loca ejus fundi tunc, cum ea fieret cessio, ædificiis, arboribus, vineis vacua fuerint, ea sola eo nomine servient.—L. 22, ff. de serv. præd. rust.

Si mihi concesseris iter aquæ per fundum tuum, non destinatâ parte, per quam ducerem—totus fundus tuus serviet.—L. 21, ff. Ibid.

(*f*) Verum constitit, ut, qua primum viam direxisset, eâ demum ire agere deberet, nec amplius mutandæ ejus potestatem haberet ;

sicuti Sabino quoque videbatur ; qui argumento rivi utebatur—quem primo qualibet ducere licuisset, posteaquam ductus esset, transferre non liceret ; quod et in viâ servandum esse verum est.—L. 9, ff. de serv.

At si iter actusve sine ullâ determinatione legatus est ; modo determinabitur : et, qua primum iter determinatum est, eâ servitus constitit : cæteræ partes agri liberæ sunt. Igitur arbiter dandus est, qui utroque casu viam determinare debet.—L. 13, § 1, ff. de serv. præd. rust.

PART III.

OF THE EXTINGUISHMENT OF EASEMENTS.

THE modes by which easements may be lost correspond with those already laid down for their acquisition:—1. Corresponding to the express grant is the express renunciation; 2. To the disposition by the owner of two tenements, the merger by the union of them; 3. To the easement of necessity, the permission to do some act which of necessity destroys it; 4. And to the acquisition by prescription, abandonment by non-user.

CHAPTER I.

BY EXPRESS RELEASE.

Must be under seal.

IT would appear that, in the case of easements, as of other incorporeal rights, an express release, to be effectual, must be under seal (*a*): this rule, however, must not be taken to exclude a written instrument not under seal, or even a parol declaration, as evidence to show the character of any act done, or any cessation of enjoyment.*

(*a*) Co. Litt. 264 b; Com. Dig. as to the interference of the Court Release (A. 1), (B. 1); [and see of Chancery, ante, p. 76, note (*c*).]

By agreement.

* In equity an easement may be lost or diminished by agreement or acquiescence.

Fisher v. Moon.

In *Fisher v. Moon* (11 L. T., N. S. 628), the plaintiff, being desirous to build, agreed with his neighbour to cut away a rock behind his

Acts of Parliament (*b*), by which easements are destroyed, as, for instance, the General Inclosure Act, Acts of Parliament.

(*b*) *Logan v. Burton*, 5 B. & Cr. 513; *Harber v. Rand*, 9 Price, 58; *White v. Reeves*, 2 B. Moore, 23; *Thackrah v. Seymour*, 1 Cr. & Mee. 18; [*Holden v. Tilley*, 1 F. & F. 650; and see the judgments in *Race v. Ward*, 7 E. & B. 384, as to the effect of a statutory extinguishment of way. See also page 160, ante, note (*f*).]

house, which gave him additional light to his back windows; and, in consideration of his so doing, his neighbour consented to his encroaching on his land with his new building, and to build so as to obstruct the light to some of his other windows. A purchaser of the neighbour's house having sued for the encroachment and the obstruction of light, *Wood, V.-C.*, on being satisfied as to the fact of the agreement, restrained him by injunction.

In *Waterlow v. Bacon* (L. R., 2 Eq. 514), the plaintiff being about to build near the defendant's house, alleged that the defendant consented to his building in consideration of his making him a new skylight, and not calling on him to contribute to the party-wall. The defendant, having afterwards sued at law for the obstruction of light, *Kindersley, V.-C.*, stayed his proceedings in order that the agreement of which specific performance was sought might, if established, be carried into effect at the hearing. *Waterlow v. Bacon.*

In *Johnson v. Wyatt* (9 Jur., N. S. 1334), *Turner, L. J.*, says that the principle of a bill for an injunction to restrain a nuisance to light, on the ground of acquiescence, amounts to a decision that the right which once existed is absolutely and for ever gone. Acquiescence. *Johnson v. Wyatt.*

In *Darvies v. Marshall* (10 C. B., N. S. 697), in an action for an obstruction to light, an equitable plea that the grievances were occasioned in pulling down and rebuilding a house, and the plaintiff had notice thereof, and the old building was pulled down and the new one erected, and large sums expended thereon by the defendant, with the knowledge, acquiescence and consent of the plaintiff, and on the faith that the plaintiff so knew of, acquiesced in, and consented to the pulling down and rebuilding, was held to be good. *Darvies v. Marshall.*

An agreement for a lease provided that the plaintiffs should not have a right to any easement which did not belong or appertain to the premises agreed to be demised, nor to any right to light or air derived from over the site of buildings which the defendants were then erecting. It was held, that the plaintiffs had contracted themselves out of the easement their lease would otherwise have granted them. (*Salaman v. Glover*, 10 W. N. 117.) *Salaman v. Glover.*

41 Geo. 3, c. 109, s. 8, have the operation of express releases.*

Building Acts. * The Metropolitan Building Acts do not affect easements. The provisions which authorize the raising of party-walls confer no authority to raise them to the prejudice of a neighbour's right to light. (*Titterton v. Conyers*, 5 Taunt. 465; *Wells v. Ody*, 1 M. & W. 452, on 14 Geo. 3, c. 78; *Crofts v. Haldane*, L. R., 2 Q. B. 194, on 18 & 19 Vict. c. 122, ss. 83, 85; and *Weston v. Arnold*, L. R., 8 Ch. 1084, on a Bristol Building Act.)

Lands and Railways Clauses Act. If the easement of light is prejudicially affected under the powers of a railway act, the owners of the easement are entitled to compensation. (*Eagle v. Charing Cross Railway Company*, L. R., 2 C. P. 638; *Duke of Bedford v. Dawson*, L. R., 20 Eq. 353.) It is the same as to easement for a foundation. (*Knapp v. London, Chatham and Dover Railway Company*, 2 H. & C. 212.) In such cases, the land not being taken but only injuriously affected, the owner of the easement is not entitled to notice of the works, but only to compensation after he has been injured, under sect. 68 of the Lands Clauses Act. (*Clark v. London School Board*, L. R., 9 Ch. 120; *Bush v. Trowbridge Waterworks Company*, L. R., 19 Eq. 291; 10 Ch. 459.)

Powers exceeded. If the act confers no power to interfere with the easement, the remedy is by action, and not by claim for compensation. (*Turner v. Sheffield and Rotherham Railway Company*, 10 M. & W. 425.)

The Ecclesiastical Commissioners were empowered to grant, for the site of a church, land freed of all rights of common, any custom to the contrary notwithstanding. This was held confined to rights of common and manorial rights of a like nature, and not to enable them to take land used by custom for a village green. (*Forbes v. Ecclesiastical Commissioners*, L. R., 15 Eq. 51.) A railway company are not, under the Railways Clauses Act, empowered to use a mortar mill to the nuisance of their neighbours, as it is not necessary for the construction of their railway—only convenient. (*Fenwick v. East London Railway Company*, L. R., 20 Eq. 544.) If a railway company take land over which there is a private right of way, without providing another, the owner of the easement has no right of action unless he has sustained special damage, such being the effect of 8 & 9 Vict. c. 20, s. 55. (*Watkins v. Great Northern Railway Company*, 16 Q. B. 961.)

CHAPTER II.

BY IMPLIED RELEASE.

SECT. 1.—*Extinguishment by Merger.*

AS an easement is a charge imposed upon the servient for the advantage of the dominant tenement, when these are united in the same owner, the easement is extinguished—the special kind of property which the right to the easement conferred, so long as the tenements belonged to different owners, is now merged in the general rights of property.

But in order that the easement should be entirely extinguished, it is essential that the owner of the two tenements should have an estate in fee simple in both of them, of an equally perdurable nature. “Where the tenant,” says *Littleton*, “hath as great and as high an estate in the tenements as the lord hath in the seigniorie, in such case, if the lord grant such services to the tenant in fee, this shall enure by way of extinguishment. *Causa patet*” (a). Upon which Lord *Coke* observes (b), “Here *Littleton* intendeth not only as great and high an estate, but as perdurable also, as hath been said, for a disseisor or tenant in fee upon condition hath as high and great an estate, but not so perdurable an estate as shall make an extinguishment.” In a previous section, speaking of seigniories, rents, profits à prendre, &c., he says, “They are said to be extinguished when they are gone for ever,

Extinguish-
ment and sus-
pension.

(a) S. 561.

(b) Co. Lit. 313 b.

Extinguish-
ment and sus-
pension.

et tunc moriuntur, and can never be revived, that is, when one man hath as high and as perdurable an estate in the one as in the other" (c).

Unless this be the case, the easement, of whatever species it be, is suspended only so long as the unity of possession continues, and revives again upon the separation of the tenements (d). "Suspense cometh of suspendeo, and, in legal understanding, is taken when a seignior, rent, profit à prendre, &c., by reason of unity of possession of the seignior, rent, &c., and of the land out of which they issue, are not *in esse* for a time, *et tunc dormiunt*, but may be revived or awaked" (e).*

So strictly has this doctrine been construed, which requires the estates in the two tenements to be of an equally high and perdurable character, that no extinguishment was held to have taken place where the king was seised of one tenement "of a pure fee-simple indeterminable," *jure coronæ*, and of the other of an estate in fee simple, determinable on the birth of a Duke of Cornwall. *Rex v. Inhabitants of Hermitage* (f).

(c) Co. Lit. 313 a.

[(d) See ante, pp. 153, note (m), 167, note (v), as to the difference between the effect of a unity of possession under Lord Tenterden's Act and at the common law.]

(e) Co. Lit. 313 a.

(f) Carthew, 239. See also

Canham v. Fiske, 2 Cr. & J. 126; *Thomas v. Thomas*, 2 C. M. & R. 34; [*James v. Plant*, 4 A. & E. 766, where it was held that the momentary seisin of a releasee to uses was insufficient to work a merger by unity of seisin.]

* The accruing right to an easement is only suspended during the unity of possession by a tenant. It is not an interruption within the Prescription Act. Thus, if light had been enjoyed as of right for fifteen years before the unity of possession, and for five years afterwards, a prescriptive right is acquired. (*Ladyman v. Grave*, L. R., 6 Ch. 763; see also *Aynsley v. Glover*, L. R., 10 Ch. 286.)

This principle appears to be equally applicable to all easements (*g*). When two tenements become completely united, and, as it were, fused into one, the owner may modify the previous relative position of the different parts at his pleasure; if he exercises this right so that the part which previously served the other no longer does so—as, for instance, by changing the direction of a spout which emptied the rain water of one house on the adjoining one—it has never been doubted that by so doing he destroyed the easement for ever (*h*).

Easements
extinguished
by unity do
not revive on
severance.

But it has been contended, that if he neglect to do so, and again sever the tenements, all easements having the qualities of being both continuing and apparent, as well as all those which existed by necessity, were revived upon the severance. In the 11th Henry 7 (*i*), it was decided, “that a customary right in the city of London to have a gutter running in another man’s land was not extinguished by unity of possession.” It was argued, that if the purchaser of both tenements had destroyed the gutter, the right would not have revived; to which *Danvers, J.*, replied, “If the matter were so, it might have been pleaded specially: it would be a good issue.”

In *Shury v. Pigott* (*h*), in an action on the case for stopping a water-course, which had been used to have its current into the plaintiff’s yard, and fill a pond with water, it was held that a unity of possession of the land of the house and place to which, and of the land through which, &c., was no bar. “There is a difference,” said *Whitelocke, J.*, “between a way or common and a water-

Shury v.
Pigott.

[(*g*) And rights in the nature of easements, as the right to have fences repaired. See ante, p. 129.]

(*h*) 11 Henry 7, f. 25; *Lady*

Browne’s case, cited in *Sury v. Pigott*, Palmer, 446.

(*i*) Fol. 25.

(*h*) 3 Bulstrode, 339; S. C. Palmer, 444, nom. *Sury v. Pigott*.

Easements
extinguished
by unity do
not revive on
severance.

*Shury v.
Pigott.*

Whether unity
of seisin is
sufficient.

course. These begin by private right, by prescription, by assent as a way or common, being a particular benefit to take part of the profits of the land—this is extinct by unity, because the greater benefit shall drown the less. A water-course doth begin *ex jure naturæ*, having taken this course naturally, and cannot be averted.” *

In the report of this case in Latch, it is said, “Rent shall be extinguished by unity, and also a way, because it does not exist *durant* the unity; but it is otherwise of a thing which exists, notwithstanding the unity.” A case of warren is cited from 35 Henry, f. 55, 56.

In *Buckby v. Coles* (l), the Court of Common Pleas intimated a decided opinion, that unity of seisin was sufficient to work an extinguishment, without actual unity of occupation. In *Drake v. Wiglesworth* (m), the court doubted whether seisin implied possession; but it should seem from a more recent case, that from seisin the law will presume possession (n).

It will, however, be found that the classes of easements with respect to which this revivor is supposed to take place, exactly correspond with those already considered, as being acquired by the implied grant resulting either from the disposition of the owner of the two tenements, or from the easement being of necessity.

It is practically immaterial whether the foundation of the right be a new grant, or a revival of the old right; but the former is (o) the most correct view of the title

(l) 5 Taunt. 311.

(m) Willes, 658.

(n) *Stott v. Stott*, 16 East, 343;
Clayton v. Corby, 2 Q. B. 813; 2
G. & D. 174. [See per *Parke*, B.,

in *England v. Wall*, 10 M. & W.
701.]

[(o) See the chapter on implied
grants, ante, p. 96, where this
question has been already fully

to them, and it is certainly more in harmony with the general principles of the law of easements (*p*).

In the civil law, on the union of two inheritances in the same owner, all servitudes were extinguished by confusion; and on any future severance it was necessary to reimpose them expressly (*q*).

Easements
extinguished
by unity do
not revive on
severance.

SECT. 2.—*Extinguishment of Necessity.*

It has already been seen, on the clearest authority both of our own law and the civil law, that if the owner of the dominant tenement authorizes an act of a permanent nature to be done on the servient tenement, the necessary consequence of which is to prevent his future enjoyment of the easement, it is thereby extinguished (*r*).

License to
obstruct.

discussed; and consult, in addition to the authorities there referred to, the judgments in *Dugdale v. Robertson*, 3 K. & J. 695, and in *Caledonian Railway Company v. Sprot*, 2 M'Q. Sc. App. 449, as to the grant of easements by implication arising from the purposes for which the principal grant is made, or from the state in which the subject-matter is at the time of the grant.]

(*p*) 2 Bing. 76; S. C. 9 Moore, 166; *Holmes v. Goring*, ante, p. 147.

(*q*) Servitutes prædiorum confunduntur, si idem utriusque prædii dominus esse cœperit.—L. 1, ff. Quem. serv. amit.

Si quis ædes, quæ suis ædibus servirent, cum emisset, traditas sibi accepit, confusa sublataque

servitus est; et, si rursus vendere vult, nominatim imponenda servitus est: alioquin liberæ veniunt.—L. 30, ff. De serv. urb. præd.

Tertio amittitur (servitus) confusione cum prædia confusa sunt, sive cum idem utriusque prædii dominus esse cœperit.—Vinnius, Comm. ad Inst. lib. 2, tit. 3, Quibus modis serv. amittuntur, § 6.

(*r*) Ante, pp. 29, 33; [and see note (*c*), p. 76; also post.]

Si stillicidii immittendi jus habeam in arcem tuam, et permisero jus tibi in eâ arcâ ædificandi, stillicidii immittendi jus amitto. Et similiter, si per tuum fundum via mihi debeat, et permisero tibi, in eo loco, per quem via mihi debeat, aliquid facere, amitto jus viæ.—L. 8, ff. Quem. serv. amit.

Amittitur servitus remissione,

License to
obstruct.

And provided the authority is exercised, it is immaterial whether it was given by writing or by parol(s).*

SECT. 3.—*Extinguishment by Cessation of Enjoyment.*

Owners of inheritance must acquiesce.

As the acquisition of an easement is an addition to the ordinary rights of property of the dominant, and a corresponding diminution of those rights of the servient tenement, so the loss of the easement, when once acquired, by restoring both tenements to their natural state, is an addition to the rights of the servient, and a corresponding diminution of those of the dominant.

[354] Hence, though the law regards with less favour the acquisition and preservation of these accessory rights, than of those which are naturally incident to property, and, therefore, does not require the same amount of proof of the extinction as of the original establishment of the right: yet as an easement, when once created, is perpetual in its nature, being attached to the inheritance and passing with it, it should seem that some acquiescence on the part of the owner of the inheritance must be necessary to give validity to any act of abandonment. The doctrine of the extinction of easements by merger,

tum apertâ tum tacitâ—putâ si permisero domino fundi servientis, in loco serviente, facere id quo servitus impediatur. — Vinnius, Comment. ad Inst. L. 2, Tit. Quibus modis servitutes amittuntur, § 6.

(s) *Liggins v. Inge*, ante, p. 44.
[As to this, it should be observed

that at the common law there is no distinction between words written and spoken, both were mere “parols;” the distinction recognized at the common law was between words and deeds, and except some statute requires a writing, mere words can do everything that writing can do.]

already considered, supports this view, proceeding, as it does, on the ground that the loss of an easement is a permanent injury to the inheritance, and can therefore only take place when the same party is the owner of the fee-simple of the servient and dominant tenements.

Cessation of
enjoyment.

The Prescription Act is silent as to the mode by which easements may be lost. Its enactments as to interruption and disabilities apply in terms to the acquisition only.

Prescription
Act.

It is the policy of the law, favouring the freedom of property, that no restriction should be imposed upon one tenement, without a corresponding benefit arising from it to another, and hence it is that it is essential to the validity of an easement that it should conduce to the more beneficial enjoyment of the dominant tenement.

Thus, where a right of way is given by deed, the right is confined to the use of a way, which is "in the same predicament as it was at the time of the making of the deed" (t).

If, therefore, any alteration be made in the disposition of the dominant tenement, of such a nature as to make it incapable any longer of the perception of the particular easement, the *status* of the dominant tenement, to which the easement was attached, and which is an inherent condition of its existence, is determined.

Loss by altera-
tions of domi-
nant tenement.

Such alteration must, of course, be of a permanent

(t) Per Curiam in *Allan v. Gomme*, 11 A. & E. 772; [but see ante, p. 339, note (f)]. It depends in all cases (see p. 559) upon the construction of the par-

ticular grant, whether the owner of the servient way is limited to any particular use of the tenement.]

Cessation of
enjoyment.

Alteration
must be per-
manent.

[355]

character, evincing an intention of ceasing to take the particular benefit, or otherwise an easement might be lost by the mere pulling down of the tenement for the purposes of necessary repair (*u*). Thus, if a man have a projecting roof, by means of which he enjoyed the easement of throwing his eaves-droppings on his neighbour's land, any alteration of the form of such projection, from which it could be inferred that he meant to direct the rain water into a different channel, would destroy his right to the easement. Thus, too, the stopping up an ancient window (*x*).

By the civil law the pulling down a house with the intention of re-building, did not cause the loss of a servitude, provided the new edifice was erected upon the site and of the dimensions of the old, and did not increase the burthen imposed upon the servient tenement (*y*).

Moore v.
Rawson.

In *Moore v. Rawson* (*z*), it appeared that the plaintiff having some ancient windows, pulled down the wall in which they were situated, and rebuilt it as the wall of a stable, without any window. About fourteen years after this, the defendant erected a building in front of this blank wall, and after such building had remained there about three years, the plaintiff re-opened a window in the same place that one of the ancient windows had formerly stood, and brought this action for the ob-

(*u*) *Luttrell's case*, 4 Rep. 86.

(*x*) *Lawrence v. Ober*, 3 Camp. 514; [but see the cases cited, post, p. 593, et seq., which qualify this proposition.]

(*y*) (Si servitus stillicidii non avertendi debebatur); si antea ex

tegula cassitaverit stillicidium, postea ex tabulato, vel ex aliâ materiâ, cassitare non potest.—L. 20, § 4, ff. de serv. præd. urb.

(*z*) 3 B. & C. 332; 5 Dowl. & R. 231.

struction to his newly-opened window by the defendant's building.

Cessation of
enjoyment.

A rule having been obtained to enter a non-suit, pursuant to liberty reserved at the trial, the Court of K. B. made the rule absolute.

*Moore v.
Ranson.*

Abbott, C. J., in delivering his judgment, said, "I [356
am of opinion that the plaintiff is not entitled to maintain this action. It appears that many years ago the former owner of these premises had the enjoyment of light and air by means of certain windows in a wall in his house. Upon the site of this wall he built a blank wall without any windows. Things continued in this state for seventeen years. The defendant, in the interim, erected a building opposite the plaintiff's blank wall, and then the plaintiff opened a window in that which had continued for so long a period a blank wall without windows; and he now complains that that window is darkened by the buildings which the defendant so erected. It seems to me, that, if a person entitled to ancient lights pulls down his house and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain for a considerable period of time, it lies upon him at least to show, that, at the time when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, that it was not a perpetual, but a temporary abandonment of the enjoyment; and that he intended to resume the enjoyment of those advantages within a reasonable period of time. I think that the burthen of showing that lies on the party who has discontinued the use of the light. By building the blank wall, he may have induced another person to become the purchaser of the adjoining ground for build-

Cessation of
enjoyment.

*Moore v.
Rawson.*

[357]

ing purposes, and it would be most unjust that he should afterwards prevent such a person from carrying those purposes into effect. For these reasons I am of opinion, that the rule for a nonsuit must be made absolute."

Bayley, J., said, "The right to light, air, or water, is acquired by enjoyment, and will, as it seems to me, continue so long as the party either continues that enjoyment, or shows an intention to continue it. In this case the former owner of the plaintiff's premises had acquired a right to the enjoyment of the light; but he chose to relinquish that enjoyment, and to erect a blank wall instead of one in which there were formerly windows. At that time he ceased to enjoy the light in the mode in which he had used to do, and his right ceased with it. Suppose that, instead of doing that, he had pulled down the house and buildings, and converted the land into a garden, and continued so to use it for a period of seventeen years, and another person had been induced by such conduct to buy the adjoining ground for the purposes of building. It would be most unjust to allow the person who had so converted his land into garden ground, to prevent the other from building upon the adjoining land which he had, under such circumstances, been induced to purchase for that purpose. I think that, according to the doctrine of modern times, we must consider the enjoyment as giving the right; and that it is a wholesome and wise qualification of that rule to say, that the ceasing to enjoy destroys the right unless at the time when the party discontinues the enjoyment he does some act to show that he means to resume it within a reasonable time."

Holroyd, J., added, "I am of the same opinion. It appears that the former owner of the plaintiff's premises

at one time was entitled to the house with the windows, so that the light coming to those windows over the adjoining land could not be obstructed by the owner of that land. I think, however, that the right acquired by the enjoyment of the light continued no longer than the existence of the thing itself in respect of which the party had the right of enjoyment; I mean the house with the windows: when the house and the windows were destroyed by his own act, the right which he had in respect of them was also extinguished. If, indeed at the time when he pulled the house down, he had intimated his intention of rebuilding it, the right would not then have been destroyed with the house. If he had done some act to show that he intended to build another in its place, then the new house, when built, would in effect have been a continuation of the old house, and the rights attached to the old house would have continued. If a man has a right of common attached to his mill, or a right of turbary attached to his house, if he pulls down the mill or the house, the right of common or of turbary will *primâ facie* cease. If he show an intention to build another mill or another house, his right continues. But if he pulls down the house or the mill without showing any intention to make a similar use of the land, and, after a long period of time has elapsed, builds a house or mill corresponding to that which he pulls down, that is not the renovation of the old house or mill but the creation of a new thing, and the rights which he had in respect of the old house or mill do not, in my opinion, attach to the new one. In this case, I think, the building of a blank wall is a stronger circumstance to show that he had no intention to continue the enjoyment of his light

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than if he had merely pulled down the house. In that case he might have intended to substitute something in its place. Here he does, in fact, substitute quite a different thing—a wall without windows. There is not only nothing to show that he meant to renovate the house so as to make it a continuance of the old house, but he actually builds a new house different from the old one, thereby showing that he did not mean to renovate the old house. It seems to me, therefore, that the right is not renewed, as it would have been if, when he had pulled down the old house, he had shown an intention to rebuild it within a reasonable time, although he did not do so *eo instanti*."

Littledale, J.—"According to the present rule of law a man may acquire a right of way, or a right of common, (except, indeed, common appendant,) upon the land of another, by enjoyment. After twenty years' adverse enjoyment the law presumes a grant made before the user commenced, by some person who had power to grant. But if the party who has acquired the right by grant ceases for a long period of time to make use of the privilege so granted to him, it may then be presumed that he has released the right. * * * I think, that if a party does any act to show that he abandons his right to the benefit of that light and air which he once had, he may lose his right in a much less period than twenty years. If a man pulls down a house and does not make any use of the land for two or three years, or converts it into tillage, I think he may be taken to have abandoned all intention of rebuilding the house; and, consequently, that his right to the light has ceased. But if he builds upon the same site, and places windows in the same spot, or does any thing to show that he did

not mean to convert the land to a different purpose, then his right would not cease. In this case, I think that the owner of the plaintiff's premises abandoned his right to the ancient lights, by erecting the blank wall instead of that in which the ancient windows were; for he then indicated an intention never to resume that enjoyment of the light which he once had. Under those circumstances I think that the temporary disuse was a complete abandonment of the right."

Cessation of
enjoyment.

*Moore v.
Ramson.*

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"Suppose a person," said *Tindal*, C. J., in delivering the judgment of the court in *Liggins v. Inge* (a), "who formerly had a mill upon a stream, should pull it down, and remove the works, with the intention never to return, could it be held that the owner of other land adjoining the stream might not erect a mill and employ the water so relinquished; or that he should be compellable to pull down his mill, if the former mill-owner should afterwards change his determination, and wish to rebuild his own? In such a case it would, undoubtedly, be a subject of inquiry by a jury, whether he had completely abandoned the use of the stream, or left it for a temporary purpose only."

*Liggins v.
Inge.*

In *Hale v. Oldroyd* (b), the plaintiff had a right to a flow of surplus water to an ancient pond. Instead of using the water to supply that pond, he had during thirty years past used it to supply three more recent ponds. It was held, he had not abandoned or lost his right to the flow of water by such user. *Rolfe*, B., said, "If the plaintiff had even filled up the (old) pond, that would not in itself amount to an abandonment, although, no doubt, it would be evidence of it."

It appears from these cases that the law has fixed no

Material ques-
tion,—Inten-

(a) 7 Bing. 693.

(b) 14 M. & W. 789.

Cessation of
enjoyment.

tion to re-
nounce right.

precise time during which this cessation of enjoyment must continue;—the material inquiry in every case of this kind must be, whether there was the intention to renounce the right. Every such alteration of the dominant tenement raises the legal presumption of an intention to give up the right; and it lies upon the party who has discontinued the enjoyment to show that such cessation was of a temporary nature only. And from the language of the judges, it does not appear to be necessary that the servient owner should have done any act after the change had taken place in the dominant tenement to assert the freedom of his tenement from the

361] easement; but it is sufficient if the consequence of the change be an entire cessation of enjoyment, accompanied by an intention to relinquish the right, though, in point of fact, in one of the cases above cited, the owner of the servient tenement had, during the cessation of enjoyment, done an act which he could not lawfully have done had the easement existed, and the owner of the dominant tenement had taken no steps to remove the obstruction; yet no stress was placed upon these circumstances.

In *Lawrence v. Obee*, Lord *Ellenborough* held, that where an ancient window had been filled up with brick and mortar for twenty years the case stood as if it had never existed (c).

Stokoe v.
Singers.

[In *Stokoe v. Singers* (d), it was held, that where the owner of a house had blocked up ancient windows, and kept them so for nearly twenty years, he had not lost the right of light, the jury finding that he did not “so close up his lights as to cause the adjoining owner to incur expense or loss on the reasonable belief that they

(c) 3 Camp. 511.

[(d) 8 E. & B. 31.

had been permanently abandoned," nor so as "*to manifest an intention of permanently abandoning the right of using them;*" but the court did not express any opinion upon the question whether the mere closing up of the lights, so as to manifest an intention of permanently abandoning the right to them, would destroy the right, unless the adjacent owner acted upon that intention; and there appears to have been some difference of opinion between the judges upon this question (c).]*

Cessation of
enjoyment.

*Stokoe v.
Singers.*

(c) A trivial diminution of the access of light, by reason of buildings erected by the dominant owner himself, would not be such a cessation of enjoyment as to justify a further obstruction by the servient owner. (*Arcedeckno v. Kell*, 2 Giff. 685.)]

* In *Crossley v. Lightowler* (L. R., 3 Eq. 279), the plaintiffs were carpet manufacturers, and had carried on business on the banks of the river Ribble from 1840 to 1861. A supply of pure water was necessary for their business. The defendants claimed a right to foul the stream with the refuse of dye-works, which had been carried on before 1839, but had then been shut up and abandoned, and re-opened by the defendants in 1864. Wood, V.-C., said: "The question of abandonment is a very nice one." "The mere nonuser of a privilege or easement of this description is not in itself an abandonment that in any way concludes the claimant, but the nonuser is evidence with reference to abandonment. The question of abandonment is one of fact, which must be determined on all the circumstances of the case." "It has always been held that a person in possession of a right, leaving it unused for a long time, and having given encouragement to others to lay out their money on the assumption of that right not being used, shall not be allowed to resume his former right, to the injury of those who have acquired a right of user which the recurrence to his long-disused easement will interfere with." "I take the law to be that you cannot, after a period exceeding by five years the time in which the right may be acquired by other persons, when other persons have in the meantime acquired rights of user of the water, re-establish your right to resume works again, which you have for that period left wholly unoccupied, by a business of a similar description." On appeal, Lord Chelmsford, C., said: "The authorities on the question of abandonment have decided that the mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long-continued suspension may render it necessary for the person claiming the right to show that some

*Crossley v.
Lightowler.*

**Cessation of
enjoyment.**

Civil law re-
quired some
act to be done
by servient
owner.

By the civil law an urban servitude could not be lost by mere abandonment on the part of the owner of the dominant, unless, during the cessation of enjoyment, some act was done by the owner of the servient tenement evincing an intention of defeating the servitude—as if a man having a window should have stopped it up during a certain time, a previously-acquired easement of the passage of light would not have been lost, unless the owner of the servient tenement had done something during the interval to obstruct the passage of light: so, too, in the case of an easement *tigni immittendi*, mere removal of the beam was not sufficient to defeat the right, unless the owner of the servient tenement stopped

indication was given during the period that he ceased to use the right of his intention to preserve it. The question of abandonment of a right is one of intention to be decided on the facts of each particular case. The case of *Reg. v. Chorley* (12 Q. B. 515) shows that time is not a necessary element in the question of abandonment, as it is in the acquisition of a right. Lord *Denman*, delivering the judgment of the court, there said: ‘We apprehend that an express release of the easement would destroy it at any moment; so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time.’” His Lordship on the facts held that the ancient dye-works, being dismantled without any intention of erecting others, was an abandonment of the right, and that the case put by *Holroyd, J.*, in *Moore v. Rawson* (3 B. & C. 332, 338), exactly applied (L. R., 2 Ch. 482).

***Cook v. Mayor
of Bath.***

In *Cook v. Mayor of Bath* (L. R., 6 Eq. 177), there was a right of way through a back door which had been closed for thirty years and then opened and used for four years before the obstruction. *Malins, V.-C.*, held that there had been no abandonment. He says: “It is always a question of fact, to be ascertained by the jury or the court from the surrounding circumstances, whether the act amounts to an abandonment, or was intended as such. If in this case the defendants had commenced building before the door had been re-opened, I should have been of opinion that the plaintiff had, by allowing it to so remain closed, led them into incurring expense, and therefore could not prevent them acting on the impression that he intended to abandon his right.”

up the hole in which the beam was placed (*f*); and, on the same ground, by no lapse of time would the right be lost during which, owing to the delay in rebuilding the servient tenement, the easement could not be exercised (*g*). Cessation of enjoyment.

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Although, however, there appears to be no authority in our law for requiring any such act as the condition of the extinction of an easement; yet such an act, unopposed by the owner of the dominant tenement, as in the case of *Moore v. Rawson*, would be almost conclusive evidence that there was no intention to preserve the easement.

A question of much greater difficulty arises in those cases in which there has been no actual cessation of enjoyment, but the mode of enjoyment has been more or less altered; and where, instead of an intention to relinquish the right, an attempt has been made to usurp a greater right than the party was entitled to. Alteration by encroachment.

Assuming, then, that the encroachment confers no new right, two questions arise:—1st, whether a valid

(*f*) Hæc autem jura similiter, ut rusticorum quoque prædiorum, certo tempore non utendo perent; nisi quod hæc dissimilitudo est, quod non omnimodo perent non utendo; sed ita si vicinus simul libertatem usucapiat, veluti si ædes tuæ ædibus meis serviant ‘ne altius tollantur,’ ‘ne luminibus mearum ædium officiatur;’ et ego per statutum tempus fenestras meas præfixas habuero vel obstruxero; ita demum jus meum amitto, si tu per hoc tempus ædes tuas altius sublatas habueris; alioquin si nihil novi feceris, retineo servitutem. Item si ‘tigni immissi’ ædes tuæ

servitutem debent, et ego eximero tignum, ita demum amitto jus meum, si tu foramen unde exemptum est tignum obturaveris et per constitutum tempus ita habueris; alioquin, si nihil novi feceris, integrum jus meum permanet.—L. 6, ff. De serv. præd. urb.

(*g*) Si cum jus haberes immittere, vicinus statuto tempore ædificatum non habuerit, ideoque nec tu immittere poteris, non ideo magis servitutem amittes; quia non potest videri usucepisse vicinus tuus libertatem ædium suarum, qui jus tuum non interpellavit.—L. 18, § 2, ff. quem. serv. amit.

Alteration by
encroachment.

easement still subsists to the extent previously enjoyed; and, 2ndly, if this be determined in the negative, whether the party is still at liberty to restore his tenement to its former condition, and recur to its former mode of enjoyment.

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The 1st question may be considered with reference to two distinct classes of easements;— those which depend upon repeated acts of man, and require no permanent alteration in the dominant tenement, as rights of way, or to draw water; and those which require for their enjoyment a permanent adaptation of the state of the dominant tenement.

Where en-
croachment
can be sepa-
rated.

In the former case, the previously existing right will not be affected by acts of usurpation; the extent of which may, in such cases, easily be ascertained: thus, if a party having a right of footway were to use it, not only as such, but also as a horse or carriage way, though he might thereby become liable to an action for such trespass, he might nevertheless sustain an action for any disturbance of his footway. The right thus sought to be usurped would, in the mode of its enjoyment, be altogether distinct from the previous easement.

Where domi-
nant tenement
permanently
altered.

With respect to those easements which require for their enjoyment a permanent adaptation of the state of the dominant tenement, it is extremely difficult to reconcile the decisions, or to extract any clear or intelligible principle from them; but it appears to be admitted, that, if the alteration in the mode of enjoyment is such as clearly not to render the easement more onerous on the owner of the servient tenement, the right remains unimpaired.

Cherrington
v. Abney.

In *Cherrington v. Abney* (*h*), a bill was filed for an

(*h*) 2 Vernon, 646, cor. *King*, L. C.

injunction to prevent stoppage of lights; there being six lights in an old house, it was insisted, that "in the new they should have but the same number of lights, and of the same dimensions, and in the same places, or else may stop up and blind them."

Alteration by
encroachment.

*Cherrington
v. Abney.*

"So must not make more stories, more lights, nor in other places.

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"It is certain they cannot alter the same to the prejudice of the owner of the soil—as if before so high as they could not look out of them into the yard, shall not make them lower, and the like ; for privacy is valuable.

"One trial had another granted."

In *Cotterell v. Griffiths* (*i*), it appeared that the plaintiff's windows had never been completely opened until a short time before the action was brought, but there had been blinds sloping upwards without giving any view over the defendant's premises. Lord *Kenyon* ruled, that the defendant having by his act made the plaintiff's windows darker than they were when the blinds were up, the action was sustainable.

*Cotterell v.
Griffiths.*

In *Martin v. Goble* (*h*), where a building having been used for upwards of twenty years as a malthouse was converted into a dwellinghouse, *M'Donald*, C. B., held, that "the house was entitled to the degree of light necessary for a malthouse, and not for a dwellinghouse; the converting it from one to the other could not affect the rights of the owners of the adjoining ground: no man could, by any act of his, suddenly impose a new restriction upon his neighbour."

*Martin v.
Goble.*

In *Chandler v. Thompson* (*l*) it appeared, "that there had been for many years a small window in the place in

*Chandler v.
Thompson.*

(*i*) 4 Esp. 69.

(*l*) 3 Camp. 80.

(*h*) 1 Camp. 322.

Alteration by
encroachment.

*Chandler v.
Thompson.*

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question. About three years before the action was brought the plaintiff considerably enlarged it, both in height and width, and put in a sash frame instead of a leaded casement. The defendant, who was the owner of the adjoining ground, then covered several inches of the space occupied by the old window, but still admitted more light to pass through the new window than the plaintiff had enjoyed before the alteration." *Le Blanc*, J., ruled, "that the whole space occupied by the old window was privileged, and that it was actionable to prevent the light and air passing through as it had formerly done. That part of the new window which constituted the enlargement might be lawfully obstructed; but the plaintiff was entitled to the free admission of light and air through the remainder of the window, without reference to what he might derive from other sources."

*Garritt v.
Sharp.*

In *Garritt v. Sharp* (*m*), it appeared that, for upwards of twenty years, the building in question had been a barn, on the side of which, abutting on the plaintiff's premises, were several apertures, about one or two inches wide, through which light and air passed to the barn, the only other opening being the barn door: the plaintiff's case was, that these openings were made for the purpose of admitting light and air; the defendant contended that they had been caused by decay and wear, by the boards shrinking. In 1833 the plaintiff turned the barn into a malthouse, stopped some of the crevices, and converted others, by cutting, into windows, to which he put lattices. The defendant then erected a wall which prevented the access, not only of any additional light which might have been obtained by the alteration,

(*m*) 3 A. & E. 325; S. C., 4 N. & M. 834.

but also, as the plaintiff alleged, of that quantity which came into the building in its original state. The defendant (as was stated on the motion for a new trial) offered evidence to show, that the alteration in the mode of admitting light to the plaintiff's building was injurious to the defendant's adjoining property; such evidence, however, was not received. *Tindal*, C. J., left it to the jury to say, whether the apertures were originally placed there on purpose to admit light, and whether the defendant had obstructed any portion of the light (*n*) admitted; and, in case of their finding in the affirmative on these questions, he directed them, if the light now fell short of the quantity before enjoyed by the plaintiff for the use of his barn, to give damages for such diminution. The jury found for the plaintiff. A new trial was moved for—first, on the ground of misdirection; on which it was contended, that “the proof given respecting the apertures in the barn did not entitle the plaintiff to any enjoyment of windows which admitted light more extensively, and in an entirely different manner; and that no license for such an enjoyment could be presumed from the license, if proved, to have crevices in the wall of the barn:” the rejection of evidence above mentioned was also relied on as a ground for a new trial.

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*Garritt v.
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The court granted a new trial, principally, as it should seem, on the ground that, “although the point was made, yet the jury were not required by the judge to consider whether the plaintiff had essentially varied the manner in which the light was enjoyed.” In the concluding part of the judgment is the following passage:—“It is

(*n*) The word “originally” there was no question that *some* seems to have been omitted here; light had been obstructed.

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Sharp.*

enough to say, that a party may so alter the mode in which he has been permitted to enjoy this kind of easement as to lose the right altogether; and, in this case, some part, even of the plaintiff's proofs, made it proper that the opinion of the jury should be taken upon that subject."

*Blanchard v.
Bridges.*

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In *Blanchard v. Bridges* (o), the alteration of the windows, upon which the question arose, was assumed by the court in their judgment to consist of "a carrying out of the walls (in which the windows were), five feet, in the same direction;" and it should seem an alteration of their shape into bay-windows,—the original wall having been destroyed.

Putteson, J., in delivering the judgment of the court, said, "As to the windows at the east, the case finds that they do not occupy the places of the old windows; the wall, in which those windows were, no longer exists; and, assuming that no greater change of position has been made than is necessarily consequent upon a carrying out of the side walls five feet, and converting the termination into a bow, such a change is, in our opinion, sufficient to prevent their being clothed with the same rights as the former windows. In whatever way precisely the right to enjoy the unobstructed access of light and air from adjoining land may be acquired (a question of admitted nicety), still the act of the owner of such land, from which the right flows, must have reference to the state of things at the time when it is supposed to have taken place; and, as the act of the one is inferred from the enjoyment of the other owner, it must, in reason, be measured by that enjoyment. The consent, therefore, cannot fairly be extended beyond the access of light and

(o) 4 A. & E. 176; 5 Nev. & Man. 567.

air through the same aperture (or one of the same dimensions and in the same position), which existed at the time when such consent is supposed to have been given. It appears to us that convenience and justice both require this limitation; if it were once admitted that a new window, varying in size, elevation, or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence. And, in the same case, a party, who had acquiesced in the existence of a window of a given size, elevation, or position, because it was felt to be no annoyance to him, might be thereby concluded as to some other window, to which he might have the greatest objection, and to which he would never have assented if it had come in question in the first instance. The case of *Chandler v. Thompson* (*p*) is not at all inconsistent with this reasoning. There, an ancient window had been enlarged; the original aperture remained: and the case only decided that *that aperture* remained privileged as before the enlargement. We do not forget that the windows in the present case, whatever their privilege may be, do not claim it as *ancient* windows in the ordinary way from an acquiescence of twenty years; but this circumstance furnishes no ground for any distinction as to the point now under consideration" (*q*).

The court also decided that the plaintiff had acquired no easement even for the original windows.*

(*p*) 3 Campb. 80. V.-C., in *Wilson v. Townend*, 30
 [(*q*) See *Renshaw v. Bean*, 18 L. J., Ch. 25, and *Hutchinson v.*
Q. B. 112, ante, p. 322, the com- *Copestake*, 9 C. B., N. S. 863, in
 ments upon it by *Kindersley*, Cam. Scac.]

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* In the *East India Company v. Vincent* (2 Atk. 83), Lord Hard- *East India*

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encroachment.

Luttrell's case.

Similar questions have arisen in the cases of other easements. In *Luttrell's case* (r) an action was brought

(r) 4 Rep. 86, n.

*Company v.
Vincent.*

wicke said: "If I should give an opinion that lengthening of windows or making more lights in the old wall than there were formerly would vary the right of persons, it might create innumerable disputes in populous cities, especially in London; and therefore I do not give an absolute opinion, but I should rather think it does not vary the right." The opinion which Lord *Hardwicke* hesitated to give has created innumerable disputes, and the law is now perhaps settled according to the leaning of his mind.

*Titterton v.
Conyers.*

Titterton v. Conyers (5 Taunt. 465) may be referred to on this subject. The plaintiff, who was a coachmaker, had thirty-four years before the action erected on the wall which divided his premises from the defendant's a workshop, with windows fronting the defendant's land. The separation-wall was condemned as ruinous, and rebuilt under the Building Act, 14 Geo. 3, c. 78; and the plaintiff at the same time rebuilt his manufactory with windows. The sill of the lowest tier of windows was placed exactly at the same height as the plaintiff's former windows had been, and another tier of windows was placed in an upper story, which did not exist in the old workshop. It was contended by the defendant, that the plaintiff had lost his right to light by rebuilding the wall under the Building Act as a party-wall, which did not allow of openings in a party-wall. But the court, without deciding whether the windows were or were not according to the Building Act, and assuming that they were not, decided that this did not justify the defendant in obstructing the windows. They were of opinion that the plaintiff's title to the light remained. It was not objected that the opening higher windows affected the right to the lower.

*Renshaw v.
Bean.*

In *Renshaw v. Bean* (18 Q. B. 112), the plaintiff had, in rebuilding his house, enlarged his ancient windows and altered their position. The defendant, in building against the new lights, obstructed the old ones. The court did not proceed on the ground that the plaintiff, by the alteration of his windows, had entirely lost the right which he had before enjoyed of having light and air through such portions of the new windows as formed portions of the old ones; but held, that, having by the alteration exceeded the limits of his right, and placed himself in such a position that the access of light to the new windows could not be obstructed by the defendant without at the same time obstructing the former right, the plaintiff had only himself to blame for the existence of such a state of things, and must be considered to have lost the former right which he had at all events until he should, by doing away with

for the diversion of water. The declaration stated, that "the plaintiff, on the 4th of March, in the 40th year

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the excess and restoring his windows to their former state, throw upon the defendant the necessity of so arranging his buildings as not to interfere with the admitted right. (See also *Wilson v. Townend*, 6 Jur., N. S. 1109; 1 Drew. & Sm. 324; *Davies v. Marshall*, 7 Jur., N. S. 720; 1 Drew. & Sm. 557; *Weatherley v. Ross*, 1 II. & M. 349; 32 L. J., Ch. 128.)

Renshaw v. Bean.

In *Hutchinson v. Copestake* (8 C. B., N. S. 102; 9 C. B., N. S. 863), the plaintiffs, in rebuilding their premises, placed the windows in different situations and made them of different sizes, and they altogether occupied more space than the windows in the former building, though some part of the new windows coincided with some parts of the old ones. The Common Pleas gave judgment against the plaintiff on the authority of *Renshaw v. Bean*. The Exchequer Chamber affirmed the judgment, on the ground that no one of the new windows was substantially the same as an old one, and that no one of the new windows was claimed as a continuation of an old one.

Hutchinson v. Copestake.

In *Cooper v. Hubbuck* (7 Jur., N. S. 457; 30 Beav. 160), Lord Romilly (Master of the Rolls) held, that an alteration in a window did not affect the easement, unless it was a material alteration, and had diminished the enjoyment of the adjoining property to any material extent, and that on restoration of the windows to their original situation the plaintiff's right remained as before; and he held, that if in an application for an injunction it was objected that an ancient window was materially altered, he would not refuse the injunction, but order the window to be restored to its original size.

Cooper v. Hubbuck.

In *Curriers' Company v. Corbett* (11 Jur., N. S. 719; 2 Drew. & Sm. 35), *Kindersley, V.-C.*, said: "When a house having ancient lights is pulled down and rebuilt, and the question arises whether the character of ancient lights which belonged to the old house attaches to the new one, the test to be applied in solution of that question is, whether the new windows, if allowed to remain, would contribute sufficient light to impose on the servient tenement either an additional burthen to that to which it was subject when the old house existed, or a different servitude; and the question whether an additional burthen or additional servitude is attempted to be imposed must be determined by a jury or a judge performing their functions. It is not every immaterial change that will prevent the new windows from sustaining the character of ancient lights. It must be something material and additional, either in respect of amount or difference of servitude imposed, or which might be imposed by the new windows."

Curriers' Company v. Corbett.

Alteration by encroachment. of Elizabeth, was scised in fee of two old and ruinous fulling-mills, and that from time whereof, &c., magna

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Binckes v. Pash.

In *Binckes v. Pash* (11 C. B., N. S. 324), the plaintiff had ancient windows on his ground-floor, but within twenty years had altered and enlarged the windows on his first floor, and it was apparent that no obstruction of the new part could have been effectual which did not also obstruct the old parts and the windows on the ground floor. The defendant erected a building which was a material obstruction to the windows on the ground floor, but no material obstruction to the altered windows. The court gave judgment against him, holding that, by opening the new windows, the plaintiff did not lose his right to the old; and although the defendant might have been justified in obstructing the old windows had he built for the purpose of obstructing the new, yet he had not done so.

Jones v. Tapling.

Jones v. Tapling (11 C. B., N. S. 283; 12 C. B., N. S. 826; 11 H. Lds. 290, nom. *Tapling v. Jones*) was an action for obstructing the lights of No. 107, Wood Street, Cheapside. The plaintiff had, in 1857, made alterations in 107, Wood Street, to adapt it to his adjoining new warehouses, by lowering the first and second floors, and lowered the windows in them to agree with the floors. One of the windows was brought down about one foot, the other was about the same size as the old one, and both occupied parts of the old apertures. He built two additional stories, with windows in each. The defendant built a warehouse, with a wall of such a height as to obstruct the whole of the windows of 107, Wood Street. The new windows could not have been obstructed in a more convenient manner than by building up a wall of sufficient height on the defendant's land. After the defendant's wall was completed, the plaintiff caused his altered windows to be restored to their original state as to size and position, and the new windows to be blocked up by filling up the spaces with brickwork, and called on the defendant to pull down his wall, and restore the plaintiff's premises to their former light and air. The Common Pleas were equally divided; but *Keating, J.*, the junior judge, having withdrawn his judgment, judgment was entered for the plaintiff. The prevailing opinion (*Erle, C. J.*, and *Williams, J.*) was, that the continuance of the obstruction after the cause for it was withdrawn was unlawful. This judgment was affirmed in the Exchequer Chamber, *Bramwell, B.*, and *Blackburn, J.*, holding that the original obstruction was unlawful; *Wightman, J.*, and *Crompton, J.*, agreeing with *Erle, C. J.*, and *Williams, J.*; and *Pollock, C. B.*, and *Martin, B.*, dissenting on the ground that the original obstruction was lawful, and that the defendant was not bound to pull down his wall on the plaintiff restoring his windows

pars aquæ cujusdam rivuli ran from a place called Hod Weir to the said mills; and that for all the said time

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to their original condition. This judgment was affirmed in the House of Lords.

The Lord Chancellor, Lord *Westbury*, after citing the third section of 2 & 3 Will. 4, c. 71, which enacts that, after twenty years' enjoyment of the access of light to a dwellinghouse, the right thereto shall be deemed absolute and indefeasible, observed that "the right to light under the statute depends upon positive enactment, and does not require, and therefore ought not to be rested on, any presumption of grant, or fiction of a license having been obtained from the adjoining proprietor. As the right is declared by the statute to be absolute and indefeasible, it cannot be lost or defeated by a subsequent temporary intermission of enjoyment not amounting to abandonment. Moreover, the absolute and indefeasible right which is the creation of the statute is not subject to any condition or qualification, nor is it made liable to be affected by any attempt to retard the access or use of light, beyond that which, having been enjoyed during the required period, is declared to be not liable to be defeated." "If my adjoining neighbour builds upon his land, and opens windows which look over my gardens, I do not acquire from this act of my neighbour any new or other right than I before possessed." He also observed, that the invasion of privacy by opening windows was not treated by the law as a wrong for which any remedy was given. He could not accept the reasoning on which the decisions in *Henshaw v. Bean* and *Hutchinson v. Copestake* were founded, because in the judgments in those cases the opening of new windows was treated as a wrongful act done by the owner of the ancient lights which occasioned the loss of the old right he possessed; and the court asks whether he can complain of the natural consequence of his own act? Two erroneous assumptions were involved in this reasoning: first, that the opening the new windows was a wrongful act; and, secondly, that such wrongful act was sufficient in law to deprive the plaintiff of his right under the statute. His Lordship's opinion was, that the appellant's wall, so far as it obstructed the access of light to the respondent's ancient unaltered window, was an illegal act from the beginning.

Lord *Westbury*, Chan.

Lord *Cranworth* gave similar reasons for his judgment, and held that the plaintiff, having made material alterations in his house, and enlarged the old windows, and added new ones, so that it was impossible to obstruct the access of light to the new windows, or to so much of the altered windows as did not occupy the old site through which the light had formerly passed, without at the same time obstructing the light which had previously passed through the old windows, did not

Lord *Cranworth*.

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there had been a bank to keep the water within the current; and that afterwards the plaintiff, on the 8th

entitle the defendant to obstruct the ancient passage of light; and he expressed his dissent from *Renshaw v. Bean* and *Hutchinson v. Copestake*.

Lord Chelmsford.

Lord Chelmsford said, that he did not see that the appellant's case would be benefited if it was established that the right of the respondent to light rested on the footing of a grant. He stated the law to be that the right acquired must necessarily be confined to the exact dimensions of the opening through which the access of light and air had been permitted. As to anything beyond, the parties possessed exactly the same relative rights which they had before. The owner of the privileged window did nothing unlawful if he enlarged it, or made a new window in a different situation. The adjoining owner was at liberty to build upon his own ground so as to obstruct the addition to the old window, or shut out the new one; but he did not acquire his former right of obstructing the old window, which he had lost by acquiescence, nor did the owner of the old window lose his absolute and indefeasible right to it, which he had gained by length of user. The right continued uninterruptedly until some unequivocal act of intentional abandonment was done by the person who had acquired it, which would remit the adjoining owner to the unrestricted use of his own premises. It would be a question in each case whether the circumstances established an intention to abandon altogether the future enjoyment and exercise of the right. If such an intention was clearly manifested, the adjoining owner might build as he pleased upon his own land; and should the owner of the previously-existing window restore the former state of things, he could not compel the removal of any building which had been placed upon the ground during the interval. For a right once abandoned is abandoned for ever. A party, by endeavouring to extend a right, instead of manifesting an intention to abandon it, evinces his determination to retain it, and acquire something more; and the enlarging an ancient window could be no cause of forfeiture, because the act was not unlawful.

Martin v. Headon.

In *Martin v. Headon* (L. R., 2 Eq. 425), the plaintiff, having within the period of prescription increased the size of his ancient window, reduced its dimensions, because he was advised that he could not, according to the doctrine of *Renshaw v. Bean*, maintain his suit unless he restored his window to its original state. *Kindersley, V.-C.*, said that it was unnecessary to do so, because *Renshaw v. Bean* was overruled.

Heath v. Bucknall.

In *Heath v. Bucknall* (L. R., 8 Eq. 1), the plaintiff pulled down an old house in Crutched-friars, and rebuilt it with other and larger windows,

October, 41 Eliz., pulled down the said fulling-mills, and in June, 42 Eliz., in place of the said fulling-mills erected two mills to grind corn, and said water ran to

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which only partially coincided with the old windows, and also built additional windows overlooking the defendant's land. The defendant rebuilt his house higher than before, and thereby, as the plaintiff alleged, obstructed the access of light and air to his ancient windows or parts of windows, or those which had replaced them. Lord Romilly, M. R., refused an injunction, on the authority of the *Curriers' Company v. Corbett*, holding that although, according to *Tapling v. Jones*, the plaintiff might be entitled to damages at law, he had no right to an injunction. He said: "The alteration of the servitude is very remarkable. It is a completely new servitude—not only the character of it is completely altered, but no part of the old character remains; and the evidence is sufficient to satisfy me that if every particle of the ancient light which remains were blocked up, the rooms in the new house would have more light than they ever had before."

In *Staight v. Burn* (L. R., 5 Ch. 163), *Giffard*, L. J., considered *Heath v. Bucknall* to have been decided on its own particular circumstances, viz., that only a very small and almost inappreciable portion of the ancient window was preserved, that the rest was new, and that there would have been no material damages at law. He entirely demurred to the conclusion that a plaintiff who, according to *Tapling v. Jones*, had a clear legal right, could not get protection from Chancery. He held the course of the court to be, that where there was a material injury to that which was a clear legal right, and it appeared that damages, from the nature of the case, would not be a complete compensation, the court would interfere by injunction.

Staight v.
Burn.

In *Aynsley v. Glover* (L. R., 18 Eq. 517; 10 Ch. 283), *Jessel*, M. R., held that *Heath v. Bucknall*, if it was to be considered as deciding that where a plaintiff had altered his ancient lights materially, so that the defendant could not obstruct the additional or new lights without to some extent obstructing the ancient lights, a court of equity would not interfere, was overruled by *Staight v. Burn*. The decision was affirmed on appeal. The Lords Justices held that it was not necessary to sustain an injunction that the plaintiff, who had enlarged his windows, should restore them to their original condition.

Aynsley v.
Glover.

According to the dicta of *Erie*, C. J., and *Willes*, J., in *Murchie v. Black* (19 C. B., N. S. 206), a party entitled to a right of support loses his right by imposing an additional burden on the land of the servient owner. (But see *Brown v. Robins*, 4 H. & N. 186; *Stroyan v. Knowles*, 6 H. & N. 454; *Hunt v. Prake*, 1 John. 705.)

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the said mills until the 10th September next following; and the same day the defendants foderunt et fregerunt the bank, and diverted the water from his mills, &c.

“ The defendants pleaded not guilty, and it was found against them, on which the plaintiff had judgment; upon which the defendant brought a writ of error in the Exchequer Chamber, on which two errors were assigned. The principal of these was, that, by the breaking and abating of the old fulling-mills, and by the building of new mills of another nature, the plaintiff had destroyed the prescription and could not prescribe to have any water-course to grist-mills: ‘ As if a man grants me a water-course to my fulling-mills, I cannot, as it was said, convert them to corn-mills, nec e contra.’

“ One of these cases cited in argument was from 10 Hen. 7, 13 a, b, and 16 Hen. 7, 9 a, b, ‘ where the abbot of Newark granted by fine to find three chaplains in such a chapel of the conussee; afterwards the said chapel fell, and there *tenetur*—(during the time there is no chapel), the divine service shall cease, for it ought to be done in a decent and reverend manner, and not at large, *sub dio*; but *tenetur*, if the chapel is rebuilt in the same place where the old stood. then he ought to do the divine service again:’ but (it was collected)

[370] if it is built in another place, then the grantee is not bound to do divine service there.

“ The next case cited strongly supports the principle that an alteration, whereby a greater burthen would be imposed, destroys the right altogether. ‘ If there be lord and tenant, and the tenant holds to cover and repair the lord’s hall, as in the 10 Edw. 3, 23, in this case, if the hall falls, yet if the lord builds the hall in the same place where it was before, and of such bigness

as it was before, the tenant is bound to cover it; but if it is of greater length or breadth, so as prejudice may come to the tenant, or if it is built in another place, or if that which was the hall is converted to a cow-house, a stable, a kitchen, or the like, he is not bound to cover it; for the lord, by his act, cannot alter the nature of the tenure, nor of the service which the tenant ought to do.'

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"It was contended in argument, that the alteration from fulling-mills to corn-mills might be injurious to the grantor, because he might have corn-mills himself, the proximity of others to which might injure him; and the principle was denied, that a man may preserve an easement by rebuilding on the same spot, and in the same manner, unless the previous destruction had been caused by some act of God, as by tempest or lightning; but it was resolved, 'that the prescription did extend to these new grist-mills, for it appears by the register, and also by Fitz. Nat. Brev., that if a man is to demand a grist-mill, fulling-mill, or any other mill, the writ shall be general, *de uno molendino*, without any addition of grist or fulling. 21 Ass. 23, agrees of a plaint in assize; so that the mill is the substance and thing to be demanded, and the addition of grist or fulling are but to show the quality or nature of the mill; and therefore, if the plaintiff had prescribed to have the said water-course to his mill generally (as he well might), then the case would be without question that he might alter the mill into what nature of a mill he pleased, provided always that no prejudice should thereby arise, either by diverting or stopping of the water as it was before; and it should be intended that the grant to have the water-course was before the build-

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ing of the mills, for nobody would build a mill before he was sure to have water, and then the grant of a water-course being generally to his mill, he may alter the quality of the mill at his pleasure as is aforesaid.'

"So, if a man has estovers, either by grant or prescription, to his house, although he alter the rooms and chambers of this house, as to make a parlour where it was the hall, or the hall where the parlour was, and the like alteration of the qualities, and not of the house itself, and without making new chimneys by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions would be destroyed; and although he builds a new chimney, or makes a new addition to his old house, by that he shall not lose his prescription, but he cannot employ or spend any of his estovers on the part newly added,—the same law of conduits and water-pipes and the like.

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"So, if a man has an old window to his hall and afterwards he converts the hall into a parlour, or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house; and although in this case the plaintiff has made a question, forasmuch as he has not prescribed generally, but particularly to his fulling-mills, yet forasmuch as in general the mill was the substance, and the addition demonstrates only the quality, and the alteration was not of the substance, but only of the quality or name of the mill, and that without any prejudice in the water-course to the owner thereof, for these reasons it was resolved that the prescription remained." A further case is mentioned of a grant to a corporation, who were afterwards incorporated by another name; it was

held, that they retained all their franchises and privileges, because no person would be prejudiced thereby.

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encroachment.

So, in *Saunders v. Newman* (s), where the claim in the declaration was for a mill generally, it was held, that the right to the discharge of the water was not lost by an alteration in the dimensions of the mill-wheel. "The owner of (a mill)," said *Abbott, J.*, in that case, "is not bound to use the water in the same precise manner or to apply it to the same mill; if he were, that would stop all improvements in machinery: if, indeed, the alterations made from time to time prejudice the right of the lower mill, the case would be different."

*Saunders v.
Newman.*

In *Thomas v. Thomas* (t), the action was brought for a disturbance of the easement of caves-droppings; and it appeared that the height of the wall, and the projection of the thatch from which the water fell, had been increased within five or six years before the action was brought. The defendants had built up a wall on their own premises, so as to prevent the water falling from the thatch at all. The jury found for the plaintiff, and the court refused to disturb the verdict; but the point appears to have been very slightly urged, and consequently but little considered by the court (u).*

*Thomas v.
Thomas.*

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(s) 1 B. & A. 258, ante, p. 237.

(t) 2 C. M. & R. 34; 1 Gale, 61, S. C.

[(u) In *Cawkwell v. Russell*, 26 L. J., Exch. 34, where a man, having an easement of a drain for the discharge of water, encroached by sending foul drainage down, the court held that the owner of the

servient tenement was justified in obstructing the entire drain. The court said, that no right of action for obstructing the original right existed; and *Pollock, C. B.*, said, that the right was only suspended. The meaning of this appears to be, that, in such a case, as long as the encroachment or excess con-

* In *Harvey v. Walters* (L. R., 8 C. P. 162), the Court of Common Pleas followed *Thomas v. Thomas*, and held that the raising of the

*Harvey v.
Walters.*

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encroachment.

Hall v. Swift.

So, in the recent case of *Hall v. Swift* (*x*), where the plaintiff had a right to water flowing from the defendant's land, across a lane, to his own land, and it appeared, that, "formerly, the stream meandered a little down the lane before it flowed into the plaintiff's land, and that, in the year 1835, the plaintiff, in order to render its enjoyment more commodious to himself, a little varied the course, by making a straight cut direct from the opening or spout under the defendant's hedge across the lane to his own premises;" and this, it was contended, negatived the right claimed in the declaration. *Tindal*, C. J., in his judgment, said—"If such an objection as this were allowed to prevail, any right, however ancient, might be lost by the most minute alteration in the mode of enjoyment,—the making straight a crooked bank or foot-path would have this result. No authority has been cited, nor am I aware of any principle of law or common sense upon which such an argument could base itself" (*y*).

tinues, the dominant owner is not, in fact, enjoying that to which he has a right at all, and, therefore, the person obstructing infringes no right. The original right is not exercised, and the obstruction is in truth an obstruction of the

exercise of another and different right, which never existed.]

(*x*) 6 Scott, 167; 4 Bing. N. C. 381.

[(*y*) This, however, was a case of an alteration in the mode of enjoyment of a natural right, not an easement.]

caves did not extinguish the easement, it not being shown that a greater burden was thrown thereby on the servient tenement. It was argued that the act of raising caves, where they projected in a new place over the servient tenement, was a trespass; but the court held that this was not so, and that the dominant owner had the same right to place his caves higher as he had to place them in their original position. The court cited with approbation the language of *Kindersley*, V.-C., adopted by Lord *Romilly* in *Heath v. Bucknall* (L. R., 8 Eq. 5).

It is directly admitted, in many of these cases, and in none is it denied—that the right of the owner of the dominant tenement to make alterations in the mode of his enjoyment is, in all cases, subject to the condition, that no additional restriction or burthen be thereby imposed on the servient heritage—and although, where the amount of excess can be ascertained and separated, as in the case of *Estovers* (z), such excess alone is bad, and the original right will nevertheless remain ; yet, in those cases where the original and excessive uses are so blended together that it would be impossible, or even difficult, to separate them, and to impede the one without, at the same time, affecting the enjoyment of the other, the right to enjoy the easement at all appears to be lost, so long as the dominant tenement remains in its altered form. It is admitted by the Court of King's Bench, in the case of *Garritt v. Sharp* (a), that “the mode of enjoying an easement might be so changed as to defeat the right altogether;” and it would seem, on principle, that this consequence should ensue, at all events to the above extent, wherever a material injury is caused to the owner of the servient tenement by the alteration, and the original and usurped enjoyments are so mixed together as to be incapable of being separately opposed.

Principle of
loss of ease-
ment by en-
croachment.

[374]

If such increased enjoyment would clearly narrow the servient owner's original right of building or otherwise acting on his own property, his tenure is damnified; for though, in strictness of law, he may still build, provided he do not injure the original easement, he can now do so only under the condition of being subject to the

Where original
and usurped
rights cannot
be separated,
semble, ease-
ment lost.

(z) *Luttrell's case*, 4 Rep. 86, a.

(a) 3 A. & K. 325; 4 Nev. & M. 834.

Principle of
loss of ease-
ment by en-
croachment.

opinion of a jury, on a question so nice as that, whether the building in question, clearly injurious as it would be to the usurped right, be or be not so to the original right.

The difficulty of this question would be increased in proportion to the magnitude of the alteration, and the lapse of time since it was made ; consequently, in point of fact, in every case of negative easement, where no action is maintainable for the simple enjoyment, the servient owner would be compelled to submit to almost any usurpation, as in very few instances could he safely exercise his right of obstruction.

[375]

Burthen of
proof lies on
dominant
owner.

It may further be observed, that, as all easements are restrictions upon the natural rights of property, in every case of conflict between the interest of the owners of the dominant and servient tenements, the liberty of the latter is more favourably regarded by the law than the attempts of the former to limit it; and, therefore, even supposing the dominant owner to retain his right of action for what would have been a disturbance of the original easement, it would be incumbent on him to show, in order to maintain his action, that the obstruction to the usurped was clearly an interference with such original right; and also, if this were made out, it should seem, he should further show that the usurped portion was capable of being obstructed without disturbing the original easement.

The judgment of the Court of King's Bench, in *Blanchard v. Bridges* [and *Renshaw v. Bean (b)*], is in accordance with these positions; but it seems difficult to reconcile these principles with some of the earlier

Nisi Prius decisions (*c*). In *Cotterell v. Griffiths* (*d*), where the right was to have light through windows impeded by blinds sloping upwards, admitting light only, but giving no view, it would be almost impossible for the owner of the adjoining land to restrict the passage of air to the original amount when the blinds had been removed. To the case of *Chandler v. Thompson* (*e*), the same observations apply: in this latter case, if the house were not built to the extreme edge of the dominant tenement, it must be physically impossible to obstruct the light passing through the increased portion, without at the same time darkening the original aperture.

Principle of
loss of ease-
ment by en-
croachment.

In the case of a water-course, this difficulty of fact [376] can rarely occur, but there, as in the other instances mentioned in *Luttrell's case*, the fact of any prejudice thereby arising to the servient heritage would be equally fatal to the validity of the easement in its altered form (*f*).

[In cases where the encroachment is such that none of the existing windows can be said substantially to correspond with an ancient window, even though part of the space occupied by each may be identical, no difficulty arises, as it cannot be proved that any window in respect of which a right had been acquired has been in fact obstructed; but a greater difficulty arises where ancient windows, being left unaltered, the dominant owner opens new windows in addition. The opinion of the Court of Queen's Bench in *Renshaw v. Bean*

[*c*] See the comments of *Kindersley, V.-C.*, on *Renshaw v. Bean*, 30 L. J., Ch. 25, acc.]

(*d*) 4 Esp. 69; ante, p. 599.

(*e*) 3 Camp. 89.

[*f*] See *Arknell v. Russell*, ante, p. 613, acc.]

Principle of
loss of ease-
ment by en-
croachment.

seems to have been that in such a case, if the dominant owner chooses to open new windows in such a position that it is impossible to obstruct the access of light to them without also obstructing the ancient windows, he could not complain of the latter being obstructed if the servient owner, in order to prevent a right from being acquired in respect of the new windows, takes means to obstruct the access of light to them (*g*).]

The civil law appears to recognize the above positions. Where a man had a right of way, and used it in a mode not warranted by the grant, although he committed a trespass on his neighbour, the right of way was not lost (*h*). But a roof could not be lowered so as to make the servitus stillicidii more burthensome (*i*).

[*(g)* *Hutchinson v. Copestake*, 9 C. B., N. S. 863.

The Master of the Rolls in *Cooper v. Hubbuck*, 7 Jur., N. S. 457, appears to have been of a contrary opinion; but see the observations of *Crompton, J.*, in *Hutchinson v. Copestake*, upon this case. It is clear, at least, that in such a case as this, no question of intention to abandon the right in respect of the old and unaltered windows can arise; and the real question is, whether or not the right in respect of the old windows can be said to be suspended by reason of the character of the encroachment, according to what was said in the judgments in *Itenshaw v. Bean*, ante, pp. 322, 616, and *Carknell v. Russell*, ante, p. 613.

Doubts are expressed by *Jervis, C. J.*, and *Cresswell, J.*, as to the doctrine of suspension in *South Metropolitan Company v. Eden*,

16 C. B. 42. That, however, was a case of ways, in which the same difficulty does not arise, as excess can always be opposed by action in the case of affirmative easements. See ante, p. 613, for explanation of suspension in the case of such rights.]

(*h*) *Is eni via vel actus debebatur, ut vehiculi certo genere uteretur, alio genere fuerit usus: videamus, ne anaserit servitutem; et alia sit ejus conditio, qui amplius oneris, quam licuit, vexerit; magisque hic plus, quam aliud, egisse videatur—sicuti si latiore itinere usus esset, aut si plura jumenta egerit, quam licuit, aut aquæ admiscuerit aliam. Ideoque in omnibus istis quæstionibus servitus quidem non amittitur: non autem conceditur plus, quam pactum est, in servitute habere.—L. 11, ff. quem. serv. amit.*

(*i*) *Si antea ex tegulâ cassitaverit stillicidium, postea ex ta-*

Upon the second question, "Whether a party is still at liberty to restore his tenement to its former condition and recur to his former enjoyment," there is no express authority in the English law. It should seem, however, that he would have no such right, as he would have clearly evinced an intention to relinquish his former mode of enjoyment (*h*); and in addition to the actual encroachment, the uncertainty caused by the attempted extension of the right would of itself impose a heavier burthen upon the owner of the servient tenement, if such return to the original right were permitted.

Restoration
after encroach-
ment.

The easements hitherto spoken of are of the continuous class, that is to say, where the enjoyment either

Mere non-user
of discontinu-
ous easements.

bulato, vel ex aliâ materiâ cassitare non potest.—L. 20, § 4, ff. de serv. præd. urb.

Stillicidium, quoquo modo adquisitum sit, altius tolli potest; levior enim sit eo facto servitus—cum quod ex alto cadet lenius et interdum direptum, nec perveniet ad locum servientem—inferius demitti non potest, quia fit gravior servitus, id est, pro stillicidio flumen. Eâdem causâ, retro duci potest stillicidium; quia in nostro magis incipiet cadere; produci non potest, ne in alio loco cadat stillicidium quam in quo posita servitus est; lenius facere poterimus, acrius non. Et omnino sciendum est—melio rem vicini conditionem fieri posse, deterio rem non posse: nisi aliquid nominatim, servitute imponenda, immutatum fuerit.—L. 20, § 5, Ibid.

(*h*) *Moore v. Rawson*, 3 B. & Cr. 332; 5 D. & R. 234; *Garritt v. Sharp*, 4 Nev. & M. 834; 3 A.

& E. 325; [but the Court of Queen's Bench, in *Renshaw v. Bean*, does not appear to have been of this opinion, and, indeed, it seems impossible to contend, that when the encroachment is not by substantial alteration, as in *Hutchinson v. Copentake*, but by addition,—as where a man opens new windows in addition to old and unaltered ones,—that he evinces any intention to abandon the right to the access of light through the old windows; and unless it were found as a fact, either that he made the alteration so as to lead the defendant to incur expense on the reasonable belief that the old lights had been permanently abandoned, or so as to manifest an intention of permanently abandoning them, there should seem to be no ground for holding that the ancient position of things might not be restored. See ante, pp. 594, 617.]

Restoration
after encroach-
ment,

is or may be continuous without any farther act of man (1). It now remains to consider how intermittent easements, as rights of way or rights to draw water, may be lost.

There seems to be no doubt that easements of this nature may be lost by mere non-user, provided such cessation to enjoy be accompanied by the intention to relinquish the right; from the very nature, however, of the enjoyment, and from the circumstance that the cessation to enjoy may take place, without any alteration in the dominant tenement, it must always be difficult to lay down any precise rule to determine when a cessation of user shall be taken to have the characteristics requisite to make it amount to an abandonment of the right.

In considering this part of the subject two questions appear to arise:—

1st. Supposing there to have been simply a cessation of user, has the law presented any fixed period to raise the presumption of a release or abandonment of the easement?

2ndly. If any such period be fixed, can a shorter period suffice, if there be clear evidence of intention to relinquish the right?

Co. Lit.

Lord Coke appears to have been of opinion, that when a title by prescription was once acquired, it could only be lost by non-user during a period equal to that required for its acquisition. "It is to be known that the title being once gained by prescription or custom cannot be lost by interruption of the possession for ten or twenty years" (m).

(1) *Ante*, p. 25.

(m) *Co. Lit.* 114, b.

At this time the analogy to the statute of James I. had not been introduced into the law.

In *Doe v. Hilder* (n), Lord *Tenterden*, in delivering the judgment of the court, said—"One of the general grounds of a presumption is the existence of a state of things which may most reasonably be accounted for, by supposing the matter presumed. Thus the long enjoyment of a right of way by A. to his house or close over the land of B., which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such right by the owner of such land; and if such right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for by supposing a release of the right. In the first class of cases, therefore, a grant of the right,—in the latter, a release of it, is presumed."

Cessation to
enjoy discontin-
uous ease-
ments.

Doe v. Hilder.

Mr. Justice *Littledale*, in the case of *Moore v. Rawson* (o), though he did not cite the above authority, expressed an opinion in accordance with it, that easements of this character could only be lost by a cessation of enjoyment during twenty years; the learned judge distinguished between these easements and a right to light and air, principally on the ground—that the former, as far as their acquisition by prescription was concerned, could only be acquired by enjoyment accompanied with the consent of the owner of the land, while the enjoyment of the latter required no such consent, and could only be interfered with by some obstruction.

Moore v.
Rawson.

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(n) 2 B. & A. 791.

(o) 3 B. & C. 339.

Cessation to
enjoy discon-
tinuous ease-
ments.

“According to the present rule of law, a man may acquire a right of way or a right of common (except, indeed, common appendant) upon the land of another by enjoyment: after twenty years’ adverse enjoyment, the law presumes a grant made before the user commenced by some person who had power to grant; but if the party who has acquired the right by grant, ceases for a long period of time to make use of the privilege granted to him, it may then be presumed he has released the right. It is said, however, that as he can only acquire the right by twenty years’ enjoyment, it ought not to be lost without disuse for the same period; and that as enjoyment for such a length of time is necessary to found a presumption of a grant, there must be a similar non-user to raise a presumption of release; and this reasoning, perhaps, may apply to a right of common or of way (*p*).

*Holmes v.
Buckley.*

In *Holmes v. Buckley* (*q*), where there had been a grant of a water-course through two pieces of land, with a covenant by the grantor to cleanse the same, the court decreed the party claiming the land under the grantor [380] to cleanse the stream, although the grantee had cleansed it at his own expense during forty years.

The precise period requisite to extinguish a right of way, by mere non-user, does not appear to have been determined by any express decision of the English courts; but it is said to have been decided in an

[*(p)* See 2 Smith’s L. C., 5th ed., p. 632. In *Borer v. Hill*, 1 Bing. N. C. 555, *Tindal*, C. J., said, that an obstruction to a way of a permanent character, if ac-

quiesced in for twenty years, would be evidence of a renunciation and abandonment of the right of way.]

(*q*) 1 Eq. Cas. Abr. 27.

American case, "That a right of way is not lost by non-user for less than twenty years" (*r*).*

The following cases elucidate the doctrine that a mere intermittence of the user, or a slight alteration in the mode of enjoyment, when unaccompanied by any intention to renounce the acquisition of a right, does not amount to an abandonment. Must be an intention to relinquish right.

In *Paynè v. Shedden* (*s*), issue was taken upon a plea of right of way; and it appeared that, by agreement of the parties, the line and direction of the way used had been varied, and at certain periods wholly suspended. *Patteson*, J., was of opinion, that the occasional substitution of another track might be considered as substantially the exercise of the old right and "evidence of the continued enjoyment of it," and that the suspension by agreement was not inconsistent with the right.

[In *The Queen v. Chorley* (*t*), the defendants were indicted for obstructing a public foot-way by driving carts in a lane through which there was a public foot-way. The lane was so narrow that carts could not pass without damage to persons on foot. The defence was that the defendant had a private right of way with carts, &c. to a malthouse, &c., situated in the lane, and that the public right of foot-way had been acquired subsequently to the private right, and was qualified by or subject to

(*r*)-*Emerson v. Wiley*, 10 Pickering, R. 310. [See Angell on Watercourses, § 250 to § 252, and the observations of *Joy*, C. B., 1 Jones' Exch. Rep. (Ir.) 123.]

(*s*) 1 Moo. & Rob. 382. The

defendant failed in establishing any right of way. See also *Hale v. Oldroyd*, ante, p. 593; and *Carr v. Foster*, 3 Q. B. 581.

[(*t*) 12 Q. B. 515.]

Must be an
intention to
relinquish
right.

it (*u*), and the question was, whether the privilege was extinguished by the acquiescence of the owners in the user of the way by the public ; a user which was inconsistent with its use as a cartway by the defendants.

The learned judge at the trial told the jury that nothing short of twenty years' user by the public, in a way inconsistent with the private user, would destroy the right. The court, on making a rule absolute for a new trial for misdirection, after saying, that "If the learned judge had done no more than remark that a *mere* ceasing to use the private way, or a *mere* acquiescence in the interruption by the public, were relied on, it would be prudent not to rely on such mere cessation or acquiescence unless shown for twenty years, it would have been no misdirection," proceed as follows:—"as an express release of the easement would destroy it any moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without reference to time ; for example, this being a right of way to the defendants' malthouse, and the mode of user by driving carts and waggons to an entrance from the lane into the malthouse yard, if the defendant had removed his malthouse, turned the premises to some other use, and walled up the entrance, and then for any considerable time acquiesced in the new use, we conceive the easement would have been clearly gone. It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or

(*u*) See *Brownlow v. Tomlinson*, 1 M. & Gr. 484; *Elwood v. Bullock*, 6 Q. B. 383; *Morant v. Chamberlin*, 6 H. & N. 541.]

the other indicates, which are material for the consideration of the jury" (*x*).

Must be an
intention to
relinquish
right.

In *Ward v. Ward* (*y*), a right of way was held not to have been lost by mere non-user for a period much longer than twenty years, it being shown that the way was not used, because the owner had a more convenient mode of access through his own land. *Alderson, B.*, said, "The presumption of abandonment cannot be made from the mere non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment; the non-user, therefore, must be the consequence of something adverse to the user.

In *Lovell v. Smith* (*z*), the owner of a right of way had, about thirty years before the action, agreed with the servient owner to use, in lieu of part of the old way, a new way over the servient owner's land, and thereafter he discontinued to use the old way, and used the new. The court held that the mere non-user of the old way and the user of the new one for more than twenty years, under such circumstances, furnished no evidence of an intention to abandon the old right. See also *Stokoe v. Singers*, ante, p. 594.]

In *Hall v. Swift* (*a*), where it appeared that about forty years since a stream of water from natural causes

[(*x*) The court, it will be seen, expressed no distinct opinion on the point left open in *Stokoe v. Singers*, ante, p. 594, but in the latter case Lord Campbell said, that "*The Queen v. Chorley* is an authority that an abandonment is effectual if communicated and acted on; it goes no further." See ante, p. 74, as to *Perry v.*

Fitzhorne.

(*y*) 7 Exch. 838.

(*z*) 3 C. B., N. S. 120.]

(*a*) 6 Scott, 167; S. C. 4 Bing. N. C. 381. See observation on this case by *Patteson, J.*, in *Carr v. Foster*, 3 Q. B. 586. [*Hall v. Swift* is, however, a case not of an easement, but of a natural right.]

Must be an
intention to
relinquish
right.

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ceased to flow in its accustomed course, and did not return to it until nineteen years before the action was brought, the court held, that the right to the flow of water was not lost. "It is further objected," said *Tindal, C. J.*, "that the right claimed has been lost by desuetude, the water having many years since discontinued to flow in its accustomed channel, and having only recommenced flowing nineteen years ago. That interruption, however, may have been occasioned by the excessive dryness of seasons, or from some other cause over which the plaintiff had no control. But it would be too much to hold that the right is, therefore, gone; otherwise, I am at a loss to see why the intervention of a single dry season might not deprive a party of a right of this description, however long the course of enjoyment might be" (*b*).

So, by the civil law, where a right of this kind was lost by the fountain drying up, it was held to revive as soon as the fountain burst forth again (*c*).

[*(b)* See *Hale v. Oldroyd*, 14 M. & W. 789, where an immemorial right to the flow of water to an ancient pond was held to continue, though the pond had been unused for thirty years, allowed to become dry, filled up with rubbish, and over-grown with grass (the owner, for his own convenience, having conducted the water into other ponds in lieu of it, and failing to establish his right in respect of the latter, by reason of the existence of a tenancy for life); and *Rolfe, B.*, said, that even if the plaintiff had actually filled up the pond himself, it would only have amounted to *evidence of abandonment.*]

[*(c)* *Hi, qui ex fundo Sutirino aquam ducere soliti sunt, adierunt me, proposueruntque — aquam, qua per aliquot annos usi sunt, ex fonte, qui est in fundo Sutirino, ducere non potuisse, quòd fons exaruisset; et postea ex eo fonte aquam fluere cœpisse; petieruntque (a) me — ut, quod jus non negligentia aut culpa sua amiserant, sed quia ducere non poterant, his restitueretur. Quorum mihi postulatio cum non iniqua visa sit, succurrendum his putavi. Itaque quod jus habuerunt tunc, cum primum ea aqua pervenire ad eos non potuit, id eis restituere placet. — L. 35, ff. de serv. præd. rust.*

Where, however, there has not been a mere cessation to enjoy, but it has been accompanied by indications of an intention to abandon the right, as by a disclaimer, there is authority for saying that a shorter period will be sufficient to extinguish the right. Such direct evidence of intention appears to have been treated in the same manner as the similar indications afforded by a change in the status of the dominant tenement. Such non-user, accompanied by confessions that the party had no right, would at all events be strong evidence, and in effect almost conclusive, that he never had any such right. [382]

Non-user with disclaimer.

In *Norbury v. Meade and others* (*d*), the Lord Chancellor said, "In the case of a right of way over the lands of other persons, being an easement belonging to lands, if the owner chooses to say I have no right of way over those lands, that is disclaiming that right of way; and though the previous title might be shown, a subsequent release of the right might be presumed."

Norbury v. Meade.

In *Harrie v. Rogers* (*e*), where a public right of way was claimed in Scotland, Lord *Eldon* said, "It was contended in argument, that, according to the law of Scotland, it was necessary to prove forty years' uninterrupted enjoyment down to the period of trial. But it is quite impossible to maintain a position of that kind; for it would lead to this consequence, that if you were to establish an uninterrupted enjoyment, even for the period of sixty or seventy years, an occupier could at any time defeat that right by successive obstructions, although these obstructions might be resisted by persons exercising the right of way, unless they thought proper

Harrie v. Rogers.

(*d*) 3 Bligh, 241.

(*e*) 3 Bligh, N. S. 447.

Non-user with
disclaimer.

*Harvie v.
Rogers.*

to go into a court of justice. I apprehend that cannot be the case.* It cannot be the case certainly by the law of England. If the right be once established by clear and distinct evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in."

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It is evident this language cannot be taken literally, that no amount of non-user would be sufficient to defeat a right of way once fully established. The obvious meaning of Lord *Eldon* was, that where acts of interruption are proved as evidence that the right has ceased, the material inquiry must be, whether such acts of interruption were known and acquiesced in (*f*).

Effect of Pre-
scription Act.

A most important question upon this point under the Prescription Act was suggested in the first edition, "Whether in all cases where an easement is claimed by prescription, the user must possess all the qualities requisite to confer a title down to the very commencement of the suit; and therefore, although the right may have clearly existed at an earlier period, it is destroyed by a subsequent user not possessing those essential qualities." It has been already seen that, by the statute, the period of user to acquire an easement must be that immediately preceding the commencement of an action; and if the statute had been held to be obligatory in all cases upon parties to proceed under it, and to exclude the common law evidence of prescription, many ancient rights would have been lost by modes which at the common law would have been insufficient to produce

[(*f*) See as to non-user of highway, judgment in *Young v. Spioer*, 1 M'Q. S. A. p. 459; judgment of *Byles, J.*, in *Daves v. Hawkins*, 8 C. B., N. S. 848; non-

user of common, *Saffyn's case*, 5 Rep. 124 a; judgment in *Edwards v. M'Cleary*, Coop. 308, and see 2 Smith, L. C. 5th ed. 632.]

that result, and which the legislature, in framing the statute, did not appear to contemplate.

Effect of Prescription Act.

As, for example, where within the period requisite to confer an easement, there has been a unity of possession of the dominant and servient tenements, no right under the statute can be acquired according to the cases cited, ante, p. 153, note (*m*), and 170, note (*e*); and supposing the right to be ancient, the incidental operation of the statute would have been, in such a case, to destroy it, if the party claiming were compelled to claim under the statute, but as the right may still be claimed as at common law, no such consequence would in fact ensue (*g*).

So, of any other failure of the requisite qualities of [384] the user.

Another anomaly would also have arisen as to the mode of losing an easement, which would be different in the case of an easement claimed by express grant and by prescription. Thus, a right of way by express grant would not be determined by unity of possession, as it would have been if claimed by prescription.

This inconvenience has been obviated by considering this as an affirmative statute, which does not take away the common law (*h*); and a party may, therefore, allege and prove a prescriptive title in the same manner as if the statute had not passed. In the case of *Onley v. Gardiner* (*i*), where the defendant failed in proving a sufficient title under the statute in consequence of a unity of possession, the court, after argument, in which it was held, that such unity defeated the title under the statute, allowed the defendant to amend his plea by

Onley v. Gardiner.

(*g*) See *Lanson v. Langley*, 4 A. & E. 890.

(*h*) Bacon, Abr. Stat. G.

(*i*) 4 M. & W. 496.

Effect of Pre-
scription Act.

Richards v.
Fry.

pleading a right of way by prescription generally; and in *Richards v. Fry* (*h*), where it was suggested in argument, that “If a party had a right three years ago, which he released, and then an action was brought against him for a trespass committed before the release, if he pleads according to the letter of the statute, *i. e.*, a user for thirty years before the commencement of the suit, he would be defeated, although the act in question was perfectly justifiable at the time.” *Patteson, J.*, observed, “He might not be able to avail himself of the statute, but he would have a defence at common law;” [and the law has since been laid down accordingly in several cases (*l*).]

Civil law.

Loss of servi-
tude by cessa-
tion of enjoy-
ment.

By the civil law, the same period was fixed for the loss of a praedial servitude by non-user, as for its original acquisition by enjoyment—ten years where both parties were present, twenty when either was absent—and, until this full period had elapsed, the servitude, though, owing to some alteration in the dominant tenement, it had ceased to exist for a series of years, might at any time revive by the two tenements being restored to their original relative position: thus, a right of way, interrupted by alienation of a portion of the dominant tenement, revived upon its re-purchase (*m*); so, too, the servitude “*altius non tollendi*” revived, if the intervening buildings were pulled down.

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(*h*) 3 Nev. & P. 72; [7 A. & E. 698.]

(*l*) See also in *Jone v. Carpenter*, 6 Exch. 831; *Parker v. Mitchell*, 11 A. & E. 788; ante, 165.]

(*m*) Si quis ex fundo, cui viam vicinus deberet, vendidisset locum

proximum servienti fundo, non impositâ servitute; et intra legitimum tempus, quo servitutes percunt, rursus eum locum adquisisset, habiturus est servitutem, quam vicinus debuisset.—L. 13, ff. quem. serv. amit.

To lose an urban servitude, as already seen, some act of the owner of the servient tenement was also required. Where the servitude was only to be used at fixed intervals, exceeding a day, the periods of prescription for the loss by non-user were prolonged to twenty and forty years. Any user within that time, however, in right of the dominant tenement, whether by the owner, occupier, or their friends, servants, or guests, was sufficient to preserve the servitude (*n*).

Civil Law.

Loss of
servitude by
cessation of
enjoyment.

(*n*) Sicut usumfructum, qui non utendo per biennium in soli rebus; per annulo autem (tempus) in mobilibus vel se moventibus diminuebatur, non passi sumus huiusmodi sustineri compendiosum interitum, sed ei decennii vel viginti annorum dedimus spatium: ita in cæteris servitutibus obtinendum esse censuimus, ut omnes servitutes non utendo amittantur, non biennio, (quia tantummodo soli rebus annexæ sunt,) sed decennio contra præsentem, vel viginti spatio annorum contra absentes: ut sit in omnibus huiusmodi rebus causa similis, explosis differentiis.—C. L. 13, ff. de serv. et aq.

Si sic constituta sit aqua, 'ut vel æstate ducatur tantum, vel uno mense,' quæritur, quemadmodum non utendo amittatur: quia non est continuum tempus: quo, cum uti non potest, non sit usus. Itaque et si alternis annis vel mensibus quis aquam habeat, duplicato constituto tempore amittitur. Idem et de itinere custoditur: si vero 'alternis diebus, aut die toto, aut tantum nocte;' statuto legibus tempore amittitur: quia una servitus est. Nam et si alternis horis,

vel unâ horâ quotidie servitutem habeat, Servius scribit, perdere eum, non utendo, servitutem: quia id, quod habet, cottidianum sit.—L. 7, ff. quem. serv. amit.

Postremo finitur (servitus) etiam non utendo—si videlicet nemo servitute usus sit, neque is cui debetur, neque possessor prædii dominantis amicusve aut hospes; cæterum ita si nemo usus sit servitute per constitutum continuum tempus, quod tempus est decem vel viginti annorum. Enimvero si servitutis usus continuum aut quotidianum tempus non habeat, fortè quia alternis annis aut mensibus constituta est, duplicato constituto tempore non utendo amittitur, id est adversus præsentem viginti annis, adversus absentes quadraginta. Idemque et in longioribus intervallis pro ratione et facultate utendi, statuendum. Quicumque vero aut nostro ut prædii nomine usus sit, possessor, mercenarius, hospes, amicus, colonus, fructuarius, retinebimus servitutem.—Vinnius, Comm. ad Inst. Lib. 2, tit. 3, quibus modis serv. amittantur, § 6.

Civil Law.

Loss of
servitude by
cessation of
enjoyment.

The period of twenty years was fixed as the limit, by a constitution of Justinian, for the loss, by non-user, of a right of way which was only to be exercised for one day, at intervals of five years (*uno tantummodo die per quinquennium*), great doubts having previously existed upon this point amongst jurists (*o*).

The period for losing by non-user, as well as that for acquiring servitude by enjoyment, might be made up from the time of the occupation or ownership of successive persons—both the acquisition and loss having respect to the tenement, and not to the person (*p*).

(*o*) C. L. 14, de serv. et aq.

vitus debetur, imputatur ei, qui

(*p*) Tempus, quo non est usus
præcedens fundi dominus, cui ser-

(in) ejus loco successit.—L. 18,
§ 1, ff. quem. serv. amit.

PART IV.

OF THE DISTURBANCE OF EASEMENTS.

CHAPTER I.

WHAT AMOUNTS TO A DISTURBANCE.

THERE is a clear distinction as to the foundation of the right of action for a private (*a*) nuisance, properly so called, and an action for the disturbance of an easement. No proof of any right, in addition to the ordinary right of property, is required in the case of the former: to maintain an action for a disturbance of an easement to receive air by a window, proof of the accessorial right must be given, but it is otherwise where an action is brought for corrupting the air, or establishing an offensive trade (*b*); yet the incidents of the two classes of rights, as far as concerns the remedies for any infringement of them, are similar. “A man has no need to prescribe to do a thing which he may do of common right, as to distrain for rent, rent service, &c.; or if I would prescribe that when a man builds a house so that from his house the water runs upon my land, I have been used

Distinction between right of action for a nuisance and for disturbance of an easement.

(*a*) Ante, p. 482. [See per Pollock, C. B., *Mumford v. Oxford, &c. Railway Company*, 1 H. & N. 34; as to the distinction between nuisances and disturb-

ances of easements in respect of the reversioner's right of action, see ante, p. 190, note, and post, p. 650.]

(*b*) Ante, p. 334.

Distinction
between right
of action for a
nuisance and
for disturbance
of an easement.

Aldred's case.

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to abate that which causes the water to run upon my land, this prescription is void, for by the common law I can do that as well" (c). In many cases an action may be founded on both these rights, thus in *Aldred's case* (d), the plaintiff complained of the stoppage of his windows, and that the defendant had erected a wooden building, and kept hogs therein, by means of which his easement of light was obstructed, and his enjoyment of his mesuage diminished by the smell of the hogs. Both injuries are called nuisances, and the same principles as to the nature of the remedies for them apply indiscriminately to both.

Must be some
sensible dimi-
nution of en-
joyment.

It is not every interference with the full enjoyment of an easement that amounts in law to a disturbance; there must be some sensible abridgment of the enjoyment of the tenement to which it is attached, although it is not necessary that there should be a total obstruction of the easement. "Item," says Bracton, "si quis aliquid fecerit quominus ad fontem, &c. ire possit, vel haurire, vel de fonte aquæ, non tantam aquam ducere vel haurire, tales cadere possunt in assisam" (e).

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Thus it is said, in *Aldred's case*, "If A. makes a water-course, running in a ditch from the river to his house, for his necessary use, if a glover sets up a lime-pit for calf-skins and sheep-skins, so near the said water-course that the corruption of the lime pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it, as it is adjudged, 13 Hen. 7, 26" (f).*

(c) Per Choke, J., 8 Edw. 4, 5, pl. 14; *Tenant v. Goldwin*, 1 Salkeld, 360.

(d) 9 Rep. 57 b.

(e) Bracton, Lib. 4, ff. 233.

(f) As to the sufficiency of

For affixing a small pipe, and thereby taking water from a larger one (*g*), or for diverting part of the water only (*h*).*

Easement need
not be totally
obstructed.

[For opening a drain into a sewer made by another on my land under a reservation of right to make it for the purpose of carrying off his drainage (*i*).]

A case is mentioned by Mr. Starkie (*k*), of an action brought for the disturbance of a water-course, where it appeared that the water, after being used for irrigation, was returned to the natural channel; and *Wood, B.*, nonsuited the plaintiff. As, however, it was shown, that a portion of the water was lost by irrigation and absorption, the Court of King's Bench is reported to have set aside the nonsuit.

To maintain an action for obstructing light, it is sufficient to show that the easement cannot be enjoyed in so full and ample a manner as before—or that the premises are to a sensible degree less fit for the purposes of business or occupation (*l*). [“To sustain this action

such damage to support an action by a reversioner, see per *Willes, J.*, *Bell v. Midland Railway Company*, 10 C. B., N. S. 287. But see *Mumford v. Orford, &c. Railway Company*, 1 H. & N. 34, and *Simpson v. Savage*, 1 C. B., N. S. 347.]

(*g*) *Moore v. Dame Browne*, Dyer, 319 b, pl. 17.

(*h*) *Anon.*, Dyer, 248 b, pl. 80; see also *E. v. Tindall*, 6 A. & E. 143.

[(*i*) *Lee v. Stevenson*, Ell. Bl. & Ell. 512.]

(*k*) 2 Evid. 2nd ed. 9, 11, note. [The question arising in such cases is stated ante, p. 267, note; and see ante, pp. 225, 232, 270.]

(*l*) *Cotterell v. Griffiths*, 4 Esp. N. P. C. 69; [*Wells v. Ody*, 7 C. & P. 410. It would be no answer to this action that the plaintiff has himself slightly diminished the light. See *Arce-deckne v. Kelk*, 2 Giff. 683.]

* *Preston v. Norfolk and Eastern Counties Railway Companies*, 2 H. & N. 735. The owner of land adjoining a river having watering-places for cattle cannot maintain an action for fouling the river, unless his rights are interfered with. (*Oldaker v. Hunt*, 6 De G., M. & G. 376; 1 Jur., N. S. 785.)

Easement need not be totally obstructed. there must be a considerable obstruction of light, and the merely taking off a ray or two will not be sufficient" (m).]

Parker v. Smith.

In *Parker v. Smith and others* (n),—*Tindal*, C. J., in summing up, said, "The question in this case is, whether the plaintiff has the same enjoyment now, which he used to have before, of light and air, in the occupation of his house;—whether the alteration, by carrying forward the wall to the height of ten feet, has or has not occasioned the injury which he complains of.

[394] It is not every possible, every speculative exclusion of light which is the ground of an action; but that which the law recognizes, is such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business. It appears that the defendants' premises had been injured by fire, and they re-erected them in a different manner. They have a right to re-erect in any way they please, with this single limitation, that the alteration which they make must not diminish the enjoyment, by the plaintiff, of light and air. It is contended by the defendants, that, on the whole, the light and air are increased. If, as matters now stand, upon the evidence you have heard, you think that this is a true proposition, then the plaintiff will have no ground of action. But if, on the contrary, you think that, in effect, these alterations (though they may separately be improvements) upon the whole diminish the quantity of light and air, then you will find for the plaintiff, with nominal damages; and your verdict will have no other effect than that of a notice to the defen-

(m) *Pringle v. Wernham*, 7 C. & P. 377, per Lord Denman, C. J.] (n) 5 C. & P. 438; *Back v. Stacey*, 2 C. & P. 465.

dants, that they must pull down the building of which the plaintiff complains." *

The injury complained of must be of a substantial nature, in the ordinary apprehension of mankind, and not arising from the caprice or peculiar physical constitution of the party aggrieved (o). Injury must be of a substantial nature.

[(o) See *Walter v. Selfe*, ante, pp. 502, 507.

* In *Back v. Stacey* (2 C. & P. 465), *Best*, C. J., directed the jury, that "It was not sufficient to constitute an illegal obstruction that the plaintiff had in fact less light than before, nor that his warehouse, the part of his house principally affected, could not be used for all the purposes for which it might otherwise have been applied. *In order to give a right of action and sustain the issue there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done.* His Lordship added that it might be difficult to draw the line, but the jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises." *Back v. Stacey.*

In *Wells v. Ody* (7 C. & P. 410), *Parke*, B., adopted the law as laid down by *Tindal*, C. J., in *Parker v. Smith*, and left to the jury the question whether the effect of the defendant's building was to diminish the light and air so as seriously to affect the occupation of the plaintiff's premises and make them less fit for occupation. *Wells v. Ody.*

In *Dent v. Auction Mart Company* (L. R., 2 Eq. 245), *Wood*, V.-C., referred to the summing-up of *Best*, C. J., in *Back v. Stacey*, in preference to any other authority on the law of actionable disturbance to the easement of light and air, because it had been approved of by the Lords Justices in a case recently before them (probably *Johnson v. Wyatt*, 2 De G., J. & S. 18; 9 Jur., N. S. 1333); and after citing the passage in italics, he said,—"With the single exception of reading 'or' for 'and,' I apprehend that the above statement correctly lays down the doctrine in the manner in which it would now be supported in an action at law."

And Lord *Chelmsford*, in *Calcraft v. Thompson* (15 W. R. 387), said, that *Back v. Stacey* had been approved of by eminent judges, and so lifted out of the sphere of a mere *nisi prius* decision.

In *Kelk v. Pearson* (L. R., 6 Ch. 809), the Lords Justices maintained the same doctrine, viz., that the disturbance, to support an action or *Kelk v. Pearson.*

Injury must be
of a substantial
nature.

“ If the boughs of your tree grow over my land, I may cut them off; but I cannot justify cutting them

warrant an injunction, must be such as substantially to interfere with the enjoyment the plaintiff has had of the light. *James*, L. J., says : “ The nature and extent of the right before the statute was to have that amount of light for a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it was a dwelling-house, or for the beneficial use and occupation of the house, if it was a warehouse, or a shop, or other place of business. That was the extent of the easement to prevent your neighbour from building on his land, so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable ;” and he says that the absolute and indefeasible right given by the statute is not greater. *Mellish*, L. J., adopts the rule stated by Mr. Gale as above (p. 635), for which *Parker v. Smith* is cited.

City of London Brewery Company v. Tennant.

This was again confirmed in *City of London Brewery Company v. Tennant* (L. R., 9 Ch. 212), by the Lord Chancellor (*Selborne*), and the Lords Justices (*James* and *Mellish*). An injunction was refused, because it did not appear that there had been any substantial diminution of the right, so as to cause inconvenience in the use of a room as a bar to a public-house. Lord *Selborne* there says that it is only in very rare and special cases, involving danger to health or something very nearly approaching it, that the court would be justified in interfering on the ground of diminution of air.

Aynsley v. Glover.

The Master of the Rolls, apparently, is disposed to go beyond this. In *Aynsley v. Glover* (L. R., 18 Eq. 544), he granted an interlocutory injunction against building to the obstruction of the window of a smoking-room in a public-house, though it was not shown that it would interfere with the comfort of those who used the room as such. He expressed his decided opinion, that *Jackson v. Duke of Newcastle* (3 D. J. & S. 275), where Lord *Westbury* refused an interlocutory injunction against an obstruction of light which did not materially interfere with the use of a room for the purpose for which it was then being used, was not law, and that the decision of Lord *Cranworth*, in *Yates v. Jack* (L. R., 1 Ch. 295), was entirely in conflict with it ; Lord *Cranworth* there saying : “ The right recognized or conferred by the statute is an absolute, indefeasible right to the enjoyment of the light, without reference to the purpose for which it has been used.” He afterwards cites with approbation Lord *Hatherley's* version of the rule in *Back v. Stacey*. The final decree was affirmed on appeal (L. R., 10 Ch. 283), but the above question did not arise. There was something more substantial in the suit than to assert the right of the free

before they grow over my land, for fear they should grow over" (*p*). Injury must be of a substantial nature.

"Whether the defendant may pull down the nuisance before the house is made, and so come to be a nuisance [395]
—I do much doubt of this,—here, it is only said, the

(*p*) Per *Croke, J.*, *Norris v. Baker*, 1 Rolle, Rep. 394.

access of light to an opening in a wall used rather as a chimney than a window. Lord Tenterden's Act relates only to the *title* to easements conferred by time, and has nothing to do with the quantity or quality of the easement. The words "absolute and indefeasible," in sect. 3, mean that the title is to be absolute and indefeasible by enjoyment for twenty years, and not subject to those exceptions, qualifications and conditions to which the title to other easements is subject.

In *Beadel v. Perry* (L. R., 3 Eq. 467), *Stuart, V.-C.*, says, "It seems to me that where, opposite ancient lights, a wall is built not higher than the distance between that wall and the ancient lights, there cannot, under ordinary circumstances, be such a material obscuration of the ancient lights as to make it necessary for this court to interfere. The Metropolitan Building Act is framed on the principle that the height of a building on the opposite side of a street should not exceed the breadth of the street. I have had the means of ascertaining from one of the most eminent judges of the Common Law Courts, that as a general proposition the Courts of Law are now disposed to take this view." Angle of forty-five degrees.
Beadel v. Perry.

In *City of London Brewery Company v. Tennant* (L. R., 9 Ch. 220), Lord Selborne says: "With regard to the forty-five degrees there is no positive rule upon that subject—the circumstance that forty-five degrees are left unobstructed being merely an element in the question of fact whether the access of light is nuduly interfered with. If the buildings to be erected opposite have not a greater angular elevation than forty-five degrees, the fact that forty-five degrees of sky are left unobstructed may, under ordinary circumstances, be considered as *prima facie* evidence that there is not likely to be material injury." *City of London Brewery Company v. Tennant.*

In *Hackett v. Baiss* (L. R., 20 Eq. 494), where the defendant was about to erect a new building taller than the old one, on the side of a narrow street in London opposite the plaintiff's, the Master of the Rolls considered that, it being about to be built higher than the width of the street, was sufficient to warrant an injunction. Both judges referred to sect. 85 of the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), following sect. 52, sched. I. of 7 & 8 Vict. c. 84 (a repealed Building Act), as declaring the intention of the legislature on the subject. *Hackett v. Baiss.*

Injury must be
of a substantial
nature.

plaintiff *conatus fuit* to edifie this house, and rear up the timber ; the defendant hath no hurt by this, for he may afterwards leave off again—the defendant is not to pull this down for the intent only. If one comes upon his own land, and intends to come upon my land, upon this imagination I am not to lay hands upon him : I never saw in any book a justification for a conation, because he did not do it” (*q*).

In *James v. Hayward* (*r*), *Jones, J.*, said, “If a private man hath a way over the land of J. S. by prescriptive grant, J. S. cannot make a gate across the way.”

“If a chandler erects a melting-house, it is a common nuisance ; but if a man is so tender-nosed that he cannot endure sea coal, he ought to leave his house” (*s*).

“If a man set up a school so near my study, who am of the profession of the law, that the noise interrupts my studies, no action lies” (*t*).*

(*q*) Per *Coke, C. J.*, in *S. C.*, 3 Bulstrode, 197, nom. *Morrice v. Baker* ; see *Penruddock's case*, 5 Rep. 101. *Lex non favet delictorum votis. Aldred's case*, 9 Coke, 58.

(*r*) Sir W. Jones, 222. [Count by reversioner for fastening gate made across private way, held good on demurrer. *Kidgill v.*

Moor, 9 C. B. 364.]

(*s*) Per *Dodderidge, J.*, in *Jones v. Powell*, Palmer, 538 ; [see the passage cited from the judgment of *Knight Bruce, V.-C.*, ante, p. 502, note, and the instances of nuisances, ante, pp. 502, 508.]

(*t*) Com. Dig. Action on the Case for a Nuisance (C).

* Setting up a national school is not a nuisance within the meaning of a covenant in a lease not to do anything which shall be deemed a nuisance by the landlord or any of his tenants. (*Harrison v. Good*, L. R., 11 Eq. 338.)

Where the defendant kept six or seven pointers so near the plaintiff's dwelling-house that his family were prevented from sleeping in the night and very much disturbed in the day-time, and the jury found for the defendant, the court refused a new trial, Lord *Kenyon* saying : “I know it is very disagreeable to have such neighbours; if the defen-

So, the ploughing up of land, over which a man had a right of way, is a nuisance to his right of way; for it is not so easy to him as it was before (*u*).^{*} Or, the driving of stakes into a water-course, or otherwise diverting it, whereby I can no longer have sufficient water for my mill (*x*); or, even if the stream be choked up for want of cleansing (*y*); or by the roots of trees growing into it (*z*).

Injury must be of a substantial nature.

Although, generally, some injury must have been sustained before redress can be had, yet, if the necessary consequence of what has already been done, will be an injury to an easement, it is not a condition precedent to the exercise of the remedy, that actual damage shall have accrued. Thus, if a party intending to build a house, which will obstruct my ancient lights, erect fences of timber, for the purpose of building, I have no right to pull them down: "cur nemo tenetur divinare. But, if a house be built, the eaves of which project over my land, I need not wait till any water actually fall from them, but may pull them down at once" (*a*). So, too it was admitted, in *Jones v. Powell* (*b*), "that an action

Imminent danger of disturbance.

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Metus et periculum.

(*u*) 2 Roll. Abr. Nusans, G. pl. 1.

(*x*) Ibid. pl. 8, 9.

(*y*) *Bower v. Hill*, 1 Bing. N. C. 549.

(*z*) *Hall v. Swift*, 6 Scott, 167; [4 Bing. N. C. 381.]

(*a*) 2 Roll. Abr. 145, Nusans, U.; R. acc. *Fay v. Prentice*, 1 C. B. 828. [See *Pickering v. Rudd*, 4 Camp. 219; *Barker v. Green*, 2 Bing. 317; *Samson v. Hoddinott*, 1 C. B., N. S. 590.]

(*b*) *Palmer*, 536.

dant continues the nuisance, and you think it advisable, you can bring a new action." (*Street v. Tugwell*, S. N. P. 1130, 12th edit.)

* The erection of the pillars of a portico on land over which a right of way is granted, which does not interfere with the reasonable use or enjoyment of the easement, although it encroaches on part of the space devoted to the way, is not even a breach of covenant against encumbering the way. (*Clifford v. Hoare*, L. R., 9 C. P. 362.)

Imminent
danger of
disturbance.

did not lie for the fear of a nuisance merely ; but it is otherwise where there is apparent cause for the fear, and, therefore, *metus et periculum* : for if a man waits until infection comes, it is too late to bring the action" (c).

Mere threats, unaccompanied by any act, do not amount to a disturbance (d).

A similar rule existed in the civil law. If the work was completed, the natural consequence of which would be damage to the party complaining, he need not wait until such damage actually occurred (e).

Disturbance of
secondary ease-
ments.

[397]

An action lies as well for a disturbance of the secondary easements, without which the primary one cannot be enjoyed, as for a disturbance of the primary easement itself.

"Item," says Bracton, "si quis ire ad fontem prohibetur, habet actionem, 'Quare quis obstruxit;' quia cui conceditur haustus, ei conceditur iter ad fontem et accessus" (f).

[(c) *Attorney-General v. Birmingham*, 4 Kay & J. 528. Damages are not recoverable for a fear that a nuisance will be continued. *Battishill v. Reed*, 18 C. B. 696; *Simpson v. Savage*, 1 C. B., N. S. 347.]

(d) *Earl of Shrewsbury's case*, 9 Rep. 46 b.

(e) Hæc autem actio (aquæ pluvie arcendæ), locum habet in

damno nondum facto, opere tamen jam facto; hoc est, de eo opere, ex quo damnum timetur, totiensque locum habet, quotiens manu facto opere agro aqua nocitura est. Id est, cum quis manu fecerit, quo aliter fluere, quam naturâ solet. —L. 1, ff. de aq. et aq. pl. arc.

(f) Lib. 4, ff. 233; [*Raco v. Ward*, 7 E. & B. 384; and see *Peter v. Daniel*, 5 C. B. 568.]

CHAPTER II.

REMEDIES FOR DISTURBANCE.

THE remedies for any disturbance of an easement are of two kinds:—1. By act of the party aggrieved; and 2. By act of law.

SECT. 1.—*Remedies by Act of the Party.*

“Nota, reader,” says Lord Coke, “there are two ways to redress a nuisance, one by action, and in that he shall recover damages, and have judgment—that the nuisance shall be removed, cast down or abated, as the case requires; or the party aggrieved may enter and abate the nuisance himself” (*a*). Remedy by act of party.
Abatement.

Bracton says, that the remedy by act of the party must be taken without delay.

“Ea vero quæ sic levata sunt ad nocumentum injuriosum, vel prostrata vel demolita, statim et recenter flagrante maleficio, sicut de aliis disseisinis, demoliri possunt, et prosterni, vel relevari et reparari, si querens ad hoc sufficiat; si autem non, recurrendum est ad eum qui jura tuctur, qui per tale breve remedium habebit” (*b*).

It was resolved by all the justices, “that a man

(*a*) *Baten's case*, 9 Rep. 54 b; 3 Comm. 6, an abatement is lawful, because an *immediate* remedy
Perry v. Fitzhove, 8 Q. B. 775. is required.]

(*b*) Lib. 4, ff. 233; and vide ff. 233 b. [According to Blackstone,

Remedy by act
of party.

Abatement. aggrieved by a nuisance may enter upon the land of another and abate the nuisance, by the common law, without prescription, and trespass will not lie against him either for the entry or abatement" (*c*).

"If a man make a ditch in his own land, by means of which the water which runs to my mill is diminished, I may myself fill up the ditch" (*d*).

"If a man erects upon his own soil anything which is a nuisance to my mill, house or land, I may remain (*estoier*) on my own soil and throw it down. And so I may enter on his soil and throw down the nuisance, and justify this in action of trespass" (*e*).

"If a nuisance be made to my freehold, I may enter on his land (who made it) and deject the nuisance."

"If a man stops my way to my common, and incloses the common, I may justify the dejection of the inclosure of the common or way."

"If a nuisance be made to my land in which I have an estate for years, I may still deject the nuisance" (*f*).

In an old case (*g*), it was decided, "That if water runs through the land of M., and he stops the water in his own close, so that it surrounds my land, I may enter on his close to remove the obstruction, and he shall not maintain an action."

*Wigford v.
Gill.*

J. S. erected a mill-dam, part upon his own land and part upon the land adjoining; the owner of the land adjoining pulled down the portion of the dam standing upon his land, by which all the dam fell down, and the water ran out. All the court held it was justifiable. "So, if one erects a wall partly upon his own lands and

(*c*) Brooke's Abridg. Nuisance,
f. 102 b, pl. 33.

(*d*) 9 Edw. 4, 35.

(*e*) 2 Rolle, Abr. Nusans, (S).

(*f*) Ibid. W.

(*g*) 8 Edw. 4, 5.

partly upon the land of his neighbour, and the neighbour pulls down the part of the wall upon his land, and thereupon all the wall falls down, this is lawful" (*h*). Remedy by act of party.

Abatement.

So, in *Rex v. Rosewell* (*i*), it is laid down, "If H. builds a house so near mine that it stops my lights, or shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil and pull it down;" "and for this reason only, it is said, a small fine was set upon the defendant in an indictment for a riot in pulling down some part of a house, it being a nuisance to his lights, and the right found for him in an action for stopping his lights." *Rex v. Rosewell.*

In *Raikes v. Townsend* (*h*), where the disturbance complained of was the obstruction of a rivulet, by means whereof the defendant's cattle could not obtain water so plentifully as before, and the defendant entered upon the soil of the plaintiff and abated the mill-dam; after judgment for the defendant, a motion was made to enter judgment for the plaintiff *non obstante verdicto*, which was overruled. The passages above cited from Rolle's Abr. were relied on as an authority for confining the right to abate to the cases of nuisance to a mill, house or land. Lord *Ellenborough*, C. J., said, "These cases are only put as instances." *Raikes v. Townsend.*

No previous demand is requisite, except where the servient tenement, on which the nuisance is erected, has passed into other hands since the erection; in this case, without such demand, the abatement would not be lawful, for the new occupant was not liable to a *quod permittat* before request made (*l*); but the demand Previous request to abate.

(*h*) *Wigford v. Gill*, Cro. Eliz. 269.

(*h*) 2 Smith, 9.

(*i*) *Salkeld*, 459.

(*l*) *Penruddock's case*, 5 Rep. 101; [*Jones v. Williams*, 11 M. &

Remedy by act
of party.
Abatement. may be made either on the lessor or lessee, for the continuance is a nuisance by the lessee, against whom an action well lies (*m*).

The abatement may be made by the party in possession of the dominant tenement, although the nuisance existed previous to his entering on the possession of it (*n*).

Care in
abating.

In abating a private nuisance, a party is bound to use reasonable care that no more damage be done than is necessary for effecting his purpose (*o*).*

But, in abating a public nuisance, it seems doubtful

W. 176. To trespass for pulling down a house while the plaintiff was in it, a plea that the house was an obstruction to defendant's right of common, and that he gave notice to remove it, was held good. *Davies v. Williams*, 16 Q. B. 546. In that case, and also in *Burling v. Read*, 11 Q. B. 908, the court distinguished the decision in *Perry v. Fitzhove*, 8 Q. B. 775, ante,

p. 74, where a similar plea, not alleging notice to remove, was held bad.]

(*m*) *Brent v. Haddon*, Cro. Jac. 555.

(*n*) Ibid.

(*o*) Com. Dig. Action on the Case for a Nuisance, D. 4; *Perry v. Fitzhove*, 8 Q. B. 775; [*Davies v. Williams*, 16 Q. B. 556, per Cur.]

* This is to be understood with reference to the damage to others as well as to the maker of the nuisance. In *Roberts v. Rose* (3 H. & C. 162; L. R., 1 Ex. 82), the plaintiff complained that in abating a nuisance from a flow of water the defendant did more damage to him than was necessary for his own protection; to which the defendant answered, that if he had abated it in any other manner he would have caused damage to those over whose lands the water flowed, and this being the fact he was held justified. The Exchequer Chamber held, that where a person attempts to justify an interference with the property of another in order to abate a nuisance, he may justify himself against the wrongdoer so far as his interference is positively necessary. If there are two ways of abating the nuisance, he must choose the least mischievous of the two. If by one of the alternatives some wrong would be done to an innocent third party or the public, such method cannot be justified, although an interference with the wrongdoer might be justified. In such case it may become necessary to abate the nuisance in a manner more onerous to the wrongdoer.

whether the same degree of caution is required (*p*). Thus, in *Lodie v. Arnold* (*q*), it is said, ["That the court seem to agree that] when H. has a right to abate a public nuisance, he is not bound to do it orderly and with as little hurt in abating it as can be." Remedy by act of party.
Abatement.

In the case of *James v. Hayward* (*r*), the defendant might have opened the gate without cutting it down, yet the cutting was lawful; and the court denied *Hill's case* (*s*), that matter of aggravation need to be answered (*t*).

(*p*) In Comyns' Digest, it is stated, "That a man may justify pulling down a house with violence, whereby the materials are lost." The only authority cited for this position, [if taken to mean that such damage may be caused by unnecessary violence,] is the case of *Lodie v. Arnold*, which is an authority for it at all events only in the case of an abatement of a public nuisance.

(*q*) Salkeld, 458.

(*r*) Cro. Car. 184; Roll. Abr. Nusans, T.; Sir W. Jones, R. 221, S. C.

(*s*) Cro. El. 384.

(*t*) The origin of the doubt above expressed, whether the same care is required in abating a public and a private nuisance, appears to be the extra-judicial opinion which, in the passage above cited, is attributed to the court in *Lodie v. Arnold*. That opinion appears from the context to have been founded on *James v. Hayward*. But in *James v. Hayward* the question was not as to the manner of abating the nuisance, but whether the gate was a nuisance, and,

if so, could be abated. The opening of the gate would not have abated the nuisance. The modern precedents of justifications on the ground of the removal of a public nuisance, allege that no unnecessary damage was done by the defendant in the removal (see 3 Chit. on Pl. 6th ed. 1008); and in the *Mayor of Colchester v. Brooke*, 7 Q. B. 339, the court put the cases of private and public nuisances on the same footing with regard to the care to be used in removing them. In the latter case, and in *Dimes v. Petley*, 15 Q. B. 283, it was held that an individual is not justified in abating a public nuisance, unless it does him a special injury; and in the case of a nuisance in a public highway, "he can only interfere with it as far as is necessary to exercise his right of passing along the highway...and cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience." In *Bluck v. Bateman*,

Remedy by act
of party.

Abatement.

In the case of *Lodie v. Arnold*, it appears from the report, that the materials of the house pulled down rolled into the sea, but not that the defendant threw them there.

[402]

In *James v. Hayward*, it is laid down, that "a (public) nuisance must be abated, in such a convenient manner as it can be: if a house be levied to the nuisance (of another), the whole house shall be abated; if a part, that part only shall be abated; but, as to the house, when the nuisance is abated, it is not lawful to destroy the materials, but they shall, after the abatement, remain to the owners of them, and to him who did the nuisance" (u).

It does not appear in this case that the gate was fastened, but rather the contrary.

["The grantee of a way has power to amend it as incident" (x).]*

SECT. 2.—*Remedies by Act of Law.*

The remedy by act of law for the disturbance of an easement is either by action at law or by suit in equity.†

18 Q. B. 876, Lord Campbell, C. J., goes so far as to say that he cannot justify unless "there was no way in which he could exercise his right without the removal."]

(u) Ante, p. 647. [As to what may be done with the materials, see *Rea v. Sheward*, 2 M. & W. 424.]

[(x) Com. Dig. Chimin (D), 6;

Duncan v. Louch, 6 Q. B. 904, per Coleridge, J., and ante, p. 528. For the principle of this, see 1 Wins. Saund. 322 c; 1 Notes to Saund. 565.

As to the powers, given by statute, of local authorities to abate nuisances, see 18 & 19 Vict. c. 121; 23 & 24 Vict. c. 77; 29 & 30 Vict. c. 41; 38 & 39 Vict. c. 55.]

* And to deviate over the grantor's land in case of obstruction by him. (*Selby v. Nettlefold*, L. R., 9 Ch. 111.)

† Now by action in one of the first four divisions of the High Court of Justice.

§ 1. *Remedy by Action at Law.*

(a) *Parties to Actions.*

Parties entitled to sue.]—As an easement is a benefit Who may sue.
attached to the dominant tenement, the party in possession may sue for any interference with its enjoyment, even though such interference be of a temporary nature only.

If such interference be of a permanent nature, and injurious to the inheritance, the reversioner may also have an action for the same disturbance (y).*

(y) Com. Dig. Action on the Case for a Nuisance, B. ; *Jackson v. Pashed*, 1 M. & S. 234; *Alston v. Scales*, 9 Bing. 3; *Baxter v. Taylor*, 4 B. & Ad. 72. See also *Hopwood v. Schafeld*, 2 Moo. & Rob. 34; *Tucker v. Newman*, 11 A. & E. 40; *Huy v. Prentice*, 1 C. B. 828; [*Kidgill v. Moor*, 9 C. B. 364; *The Metropolitan Association v. Petch*, 5 C. B., N. S. 504.]

* The action by a landlord for an injury to land in the possession of his tenant may be traced to very early times. There are several cases in the Year Books where such actions have been maintained, not only for a permanent damage or destruction of the land, as in 19 Hen. 6, 45, where land in the possession of a tenant at will was subverted by a stranger, and it was held that the tenant at will should have an action of trespass, because he could not have the profit of the land, and the landlord another action of trespass for the destruction of the land (Bro. Abr. Trespas. pl. 131; 2 Rol. Abr. 551, Trespas. N. pl. 3); but also for transient acts commencing and ending during the tenancy, but which occasioned loss to the landlord, as for ousting a tenant (12 Hen. 6, 4), and for menacing tenants at will, whereby they determined their tenancies (9 Hen. 7, 7; 1 Rol. Abr. 108, pl. 21; Com. Dig. Action on the Case for Misfeasance, A. 6; cited by Holt, C. J., *Keeble v. Hickeringill*, 11 East, 576; Willes, J., *Bell v. Midland Railway Company*, 10 C. B., N. S. 307.) And for improperly setting up a court, and, by frequent distresses on the tenants for not attending the court, impoverishing them so that they were unable to pay their rent. (*Earl of Suffolk's case*, 13 Hen. 4, 11; 1 Rol. Abr. 107, pl. 7; Com. Dig., Action on the Case for a Disturbance, A. 6; cited by Willes, J., *Bell v. Midland Railway Company*.) And for a nuisance in fouling water with the

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Year Books.

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[The cases of *Kidgill v. Moor* (z), and the *Metropolitan Association v. Petch* (a), cited ante, p. 192, have

When rever-
sioner may sue.

[(z) 9 C. B. 364.

Borer v. Hill, 1 Bing. N. C.

(a) 5 C. B., N. S. 504; see also 555.]

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refuse of a lime-pit, in which the defendant steeped calves' skins and sheep skins, which caused the plaintiff's tenants to leave his houses. (*Prior of Southwark's case*, 13 Hen. 7, 26; cited by *Wray*, C. J., *Aldred's case*, 9 Rep. 59 a.) And for a wrongful act, which was a prejudice to the landlord's title, as by taking toll of his tenant who was exempt from toll. (43 Edw. 3, 29; 2 Rol. Abr. 107, pl. 8.)

Comyns'
Digest.
Biddlesford
v. Onslow.

The rule laid down in Com. Dig., Action on the Case for a Nuisance, B., on the authority of *Biddlesford v. Onslow* (3 Lev. 209) and *Jesser v. Gifford* (4 Bur. 2141), is, "If the nuisance is to the damage of the inheritance, he in the reversion shall have an action for it." The authorities relied on by the court in *Biddlesford v. Onslow* were 19 Hen. 6, 45; 12 Hen. 6, 4; 2 Rol. Abr. 551; and *Love v. Piggott*, Cro. El. 55, which is "It was said there are divers presidents, that if a lessee for years be sued in the Court Christian for tithes, he in the reversion may have a prohibition."

Thomlinson
v. Brown.

In *Thomlinson v. Brown* (Sayer, 214), an action was brought by a landlord against his tenant for stopping up the windows of the house. It was said that, as the nuisance to the house might be abated before the defendant's term expired, the plaintiff could not then maintain an action against his own lessee for stopping them up; but the court were of opinion, that the plaintiff might then maintain an action for the injury to his inheritance by obstructing the ingress of light and air into the house, and that the action did as well lie against the defendant, his own lessee, as against any other person.

Jesser v.
Gifford.

Jesser v. Gifford (4 Bur. 2141) was an action by a reversioner for erecting a wall, whereby the plaintiff's lights were obstructed. Mr. Justice *Aston* read the case of *Thomlinson v. Brown*, where Mr. Norton, in arrest of judgment, argued that a temporary nuisance cannot be an injury to the inheritance; it may be abated before the estate comes into possession. But Mr. *Crowle*, for the plaintiff, answered that it was a damage done to the inheritance, for if the reversioner wanted to sell his reversion, the obstruction would lessen the value; and the court were of opinion that an action might be brought by the tenant in respect of his possession, and by the landlord in respect of his inheritance, for the injury done to the value of it. Lord *Mansfield*, "That is decisive."

Jackson v.
Pesked.

With these cases before them, the Court of Queen's Bench, in *Jackson v. Pesked* (1 Maule & Sel. 234), arrested the judgment in an action

defined what is such a permanent damage as will entitle the reversioner to sue for disturbance of an easement.

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action at law.

by a reversioner for building on a wall in the possession of his tenant, because the declaration did not state wrongful acts which *permanently* injured the land, and would therefore be *necessarily* injurious to the reversion, nor allege as a fact that they were done to the damage of the plaintiff as reversioner, or that his reversion was lessened in value. The judgment implies that acts of permanent injury to land, as by the destruction of a part of it, are necessarily injurious to the reversion (see *Alston v. Scales*, 9 Bing. 3), but that the reversioner may sue for any other wrongful act which in fact diminishes the value of his estate.

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reversion.

In *Shadwell v. Hutchinson* (Moo. & Malk. 350; 3 C. & P. 615), an action was brought by a reversioner for the defendant having, before the action, commenced and continued a roof or cover to the obstruction of an ancient window; and Lord *Tenterden* held, that the reversioner might maintain the action, because it was an injury to the right, and the effect of letting the obstruction stand might be that, from death of witnesses, the evidence of its erection might be lost, and so the injury *become permanent*. A second action was brought for the continuance of the obstruction (*Shadwell v. Hutchinson*, 2 B. & Ad. 97), and the former recovery was pleaded. The court held, that if the erection, in the first instance, was an injury to the reversion, the continuance must be so likewise. The continuance of the obstruction would, in fact, render the proof of the title more difficult at a future time, notwithstanding the former recovery. In these cases, as in *Thomlinson v. Brown* and *Jesser v. Gifford*, the plaintiff recovered for the injury to his right, and the diminution of the value of his estate by the past obstruction, and not because it was a permanent erection, which might continue when his reversion became an estate in possession. Lord *Tenterden* says, that the injury might become permanent, not that it was so. The recovery in the second action shows that the judgment in the first was given for the past obstruction, and not for its permanence.

Shadwell v.
Hutchinson.

In *Baxter v. Taylor* (4 B. & Ad. 72) the plaintiff failed, because the trespass proved did not in fact injure the reversioner. *Parko, J.*, states the law in the same terms as in *Jackson v. Pesked*; he says, "I am clearly of opinion that there was no injury to the plaintiff's reversionary interest; and to entitle him to maintain this action it was necessary for him to prove that the act complained of was injurious to his reversionary interest, or that it should appear to be of such a permanent nature as to be necessarily injurious." And in *Tucker v. Newman* (11 A. & E. 43), *Patteson, J.*, says of *Baxter v. Taylor*, "The subject of complaint in that case was a single temporary act.

Baxter v.
Taylor.

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action at law.

A similar question to that raised in the cases above cited] arises where the action is for the disturbance,

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The act was no injury in itself, but was complained of as done with intent to establish a right of way."

Dobson v.
Blackmore.

In *Dobson v. Blackmore* (9 Q. B. 991), the jury found that no damage had been done to the reversion. Lord *Denman*, delivering the judgment of the court, says (p. 1004), "If, indeed, an obstruction of a public road appeared to be of a permanent nature in its construction, or professed either by notice affixed, or in any other way, to deny the public right, and so led to the opinion that no road was there, the value of the house might be lowered in public estimation, and pecuniary loss might follow, for which I will not say that an action would not lie."

Kidgill v.
Moor.

In *Kidgill v. Moor* (9 C. B. 364), the action was for fastening a gate across a way on divers days before the commencement of the suit, and continuing it so fastened until the commencement of the suit, to the injury of the plaintiff's reversion; and after verdict for the plaintiff, the defendant moved to arrest the judgment, which the court refused to do, because the acts complained of might have been injurious to the reversion. Although *Maule, J.*, and *Williams, J.*, speak of the injury as permanent, the record shows that the judgment was given for a grievance which ended at the commencement of the action.

Mumford v.
Oxford, &c.
Rail. Co.

In *Mumford v. Oxford, Worcester and Wolverhampton Railway Company* (1 H. & N. 34), it was for the first time held, that to give a right of action to a reversioner, the injury must be of a permanent character. The action was for making hammering noises, to the great nuisance of the tenant and all persons being in the house, whereby he refused to remain, and the messuage became depreciated, and the plaintiffs were injured in their reversion. The judge at *Nisi Prius* left the case to the jury, with a direction favourable to the defendants, and the verdict was for the defendants. The decision of the court, perhaps, amounts to no more than that in the case before them the reversion was not injured in fact. The hasty, and not very consistent language of the judges, in refusing a rule nisi, can hardly be considered as establishing the law, that nothing but an act of a permanent nature can be a legal injury to a reversion. The Chief Baron says, "The shed may be removed at any time,"—holding, in effect, that a shed which is an injury to an easement can be no injury to a reversion if it can be removed at any time, contrary to *Thomlinson v. Brown*, *Jesser v. Gifford*, and *Shadwell v. Hutchinson*. He afterwards cites as authority the judgment of *Parke, J.*, in *Baxter v. Taylor*, in which it is stated that an act not of a permanent nature, if in fact injurious to the reversion, is actionable at the suit of the reversioner. One of the judges doubted

[not of an easement, but of a natural right, and it has been held in such a case that for] a trespass on the land

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whether an action could be properly said to be sustainable for an injury to a reversionary interest, a matter which had been free from doubt from the time of the Plantagenets.

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reversion.

In *Simpson v. Savage* (1 C. B., N. S. 347), the action was for an injury to the reversion by carrying on the trade of an agricultural implement maker near to the plaintiff's houses, which produced a nuisance of noise and smoke, and his tenants gave notice to quit, but had not quitted; and it was proved that, in consequence, the plaintiff's houses would not realize as much rent as before. Lord *Campbell*, at the trial, ruled that there was a distinction between the smoke nuisance and the noise, and that there was evidence of an injury to the reversion by the smoke. The verdict was for the plaintiff, damages 40s. Leave was given to set it aside, and enter a nonsuit, if the court should be of opinion that there was no injury to the reversion. The court, after time taken to consider, made the rule for a nonsuit absolute. They say, "After considering the authorities, we are of opinion that since, in order to give a reversioner an action of this kind, there must be some act done to the injury of the inheritance, the necessity is involved of the injury being of a permanent character." "The case is not distinguishable from *Munford v. Oxford, Worcester and Wolverhampton Railway Company*." "The real complaint by the reversioner is, that he fears that the defendant or some other occupier will continue to make fires, and cause smoke to issue from the chimney; and if the reversion would sell for less, that is not on account of anything that has been done, but of the apprehension that something will be done at a future time." In this case, the question submitted to the court was, whether the reversion had in fact been injured, and as there had been no loss of tenants, no reduction of rent, no sale or attempt to sell the reversion, and no proof that its value was diminished, the decision may be correct.

Simpson v. Savage.

In the *Metropolitan Association for Improving the Dwellings of the Industrious Classes v. Petch* (5 C. B., N. S. 504), the action was for erecting a hoarding to the obstruction of light, and continuing it from thence hitherto, to the injury of the plaintiff's reversion. The declaration was demurred to, because a hoarding was not permanent, but the court gave judgment for the plaintiff—*Cockburn*, C. J., on the ground that the erection might be permanent, *Williams*, J., on the ground that it might be so far permanent as to be an injury to the reversion. "There are abundant authorities to show, that although the thing complained of may not be of a permanent character in the sense of lasting for many years, yet it may be so set up as to be permanent in the sense of its ensuing as an injury to the reversion." *Willes*, J., says, "The decla-

Metropolitan Association, &c. v. Petch.

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action at law.

not of a continuous nature, even though committed expressly in the assertion of a right, the reversioner could not sue (*b*).

(*b*) *Barter v. Taylor*, 4 B. & Ad. 72. [*Aliter*, if the disturbance was of a continuous nature; *Sampson v. Hoddinott*, 1 C. B., N. S. 590.]

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reversion.

ration in an action of this sort must either state something which is necessarily an injury to the reversion, as the cutting down timber trees, or if it state something else which may or may not be an injury to the reversion, it must go on to aver that the reversionary interest of the plaintiff is thereby injured." *Byles*, J., says, "It seems to me, that even adopting Mr. Wilkinson's argument (that the hoarding was only a temporary erection), a hoarding is something which may or may not be an injury to the reversion."

Bell v. Midland Rail. Co.

In *Bell v. Midland Railway Company* (10 C. B., N. S. 287), the action was for obstructing the access to the plaintiff's wharf in the possession of his tenants, by railway carriages and other obstructions, which were intended to be permanent, in denial of the plaintiff's right, and which had caused special damage to the plaintiff, but which the defendants had been compelled to remove by injunction before the action brought. *Willes*, J., there says (p. 306), "It is not necessary that there should be a permanent obstruction of the right of way in order to give the reversioner a right of action; it is enough if the act is calculated to abridge or interfere with the estate of the reversioner."

Crump v. Lambert.

In *Crump v. Lambert* (L. R., 3 Eq. 409; 17 L. T., N. S. 133), the plaintiff was the owner of two houses, in one of which he resided, and he complained that the defendant, who carried on the business of an iron bedstead-maker, by the noise made in carrying on his business, and the smoke and effluvia issuing from his factory, diminished the value of the plaintiff's property, as well as interfered with the comfort and health of himself and family. Lord *Romilly*, M. R., granted plaintiff an injunction to restrain the defendant from making noises in his factory, so as to occasion nuisance to the plaintiff, *as owner* or occupier of the messuage mentioned in the bill. His lordship treated a nuisance from a noisy manufactory as an injury to the inheritance as well as to the occupation.

Johnstone v. Hall.

In *Johnstone v. Hall* (2 K. & J. 414), *Wood*, V.-C., held, that a remainder-man could not enforce a covenant in a lease prohibiting trades when the house leased was used as a school, there being no proof of damage. He says, "If there were any noxious trade being carried on, I should have no hesitation in deciding that there would have arisen such a case of manifest damage to the property that the reversioner

The correctness of the decision in the last case appears to depend upon the question, whether the user during the continuance of the particular estate would be evidence against the reversion,—which the court assumed it would not. But even admitting that enjoyment, shown to have commenced since the beginning of the particular estate, would confer no title as against the reversioner, even if he was aware of it—a point of considerable doubt (*c*)—it seems hardly possible to say

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*Baxter v.
Taylor.*

(*c*) Vide supra, Part I. Chap. V. Sect. 2, pp. 189—192.

would really be injured; but then such a state of facts would bring it within the cases at law where the reversioner, having alleged and proved special damage, is allowed to maintain his action." Injury to reversion.

In *Mott v. Shoolbred* (L. R., 20 Eq. 22), an injunction was refused to a reversioner against an excessive user of the street in front of his house, by blocking it up with carts and vans, and turning it into a stable-yard. The decision was the same where the nuisance complained of was the noise, steam and smoke arising from steam engines and machinery, and the house affected was occupied by weekly tenants. (*Jones v. Chappell*, L. R., 20 Eq. 539.)

*Mott v.
Shoolbred.*

*Jones v.
Chappell.*

A man who carries on a noisy or offensive trade claims a right to do so as against all persons affected by it, and may acquire such right if permitted to do so for twenty years (ante, 483). He may acquire it against the reversioner, though during that time the property was under lease; at all events, if the reversioner is unable to show when it commenced, and the reasoning in *Shadwell v. Hutchinson* applies. The *Earl of Suffolk's case* (13 Hen. 4, 11; 43 Edw. 3, 29), and *Love v. Piggott* (Cro. El. 55), are authorities that a reversioner may sue for a wrongful attempt to impose a burden on his land not more permanent than the noise or smoke of an offensive trade.

A reversion is a present estate, entitling a reversioner to the rents, valuable and saleable, and the action for an injury to it is given to recover compensation for a past wrong which has diminished its value. The measure of damage is by how much less the reversion will sell for in consequence of the wrongful act of the defendant. (*Hosking v. Phillips*, 3 Ex. 182.) When the nuisance is a continuing one, which may be removed, and the wrongdoer liable to a fresh action, this is not so. In such case the jury should give nominal damages in the first action, and afterwards such damages as may compel the defendant to abate it. (*Battishill v. Reed*, 18 C. B. 696.)

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action at law.

that enjoyment during a long particular estate would not interpose difficulties to the reversioner in resisting the claim upon its determination. "The ground upon which a reversioner is allowed to bring his action for obstructions, apparently permanent, to light and other easements which belong to the premises is, that, if acquiesced in, they would become evidence of a renunciation and abandonment" (*d*).

[On a demurrer to a count for injury to the plaintiff's reversionary interest in a house by the erection of a hoarding which obstructed its ancient lights (*e*), *Williams, J.*, said, "if at the trial it appears that the thing complained of is of a mere transitory character, the jury will come to the conclusion that it is not such an injury as to entitle the plaintiffs to maintain the action. But it may be that this hoarding may have been kept up in denial of the plaintiffs' title to the windows in question; in which case it might furnish a serious body of evidence against them, if ever their rights should come to be contested. In *Simpson v. Savage* (*f*), the court thought that the making of fires and causing smoke to issue was not an act of a permanent nature, so as in itself to be an injury to the reversion. But there are abund-

(*d*) Per Cur. in *Bower v. Hill*. See also 1 Wms. Saund. 346 b, n.; 1 Notes to Saund. 525; and *Durham and Sunderland Canal Company v. Walker*, 2 Q. B. 963; *Hopwood v. Schofield*, 2 M. & Rob. 34.

(*e*) *The Metropolitan Association v. Petch*, 5 C. B., N. S. 504.

(*f*) 1 C. B., N. S. 347; contrary to the ruling of Lord Campbell, C. J., at the trial. See also *Mumford v. Oxford, &c. Railw.*

Co., 1 H. & N. 34, where the plaintiffs' tenants gave notice to quit, and left, in consequence of loud noises made by hammering in the defendants' workshops, and the court held there was no evidence of a permanent injury. According to the judgment of *Willes, J.*, in *Bell v. The Midland Railw. Co.*, 10 C. B., N. S. 307, it may be a ground of action that an act done has deprived the plaintiff of his tenants.

ant authorities to the effect, that though the thing complained of may not be of a permanent nature in the sense of lasting for years, yet it may be permanent in the sense of enuring as an injury to the reversion." "Here," said *Willes*, J., in the same case, "the thing complained of may be an injury to the reversion, as by affording evidence in denial of the right, and, therefore, we cannot say that the declaration is bad." Also, in *Bell v. The Midland Railway Company* (*g*), the same judge laid down "that it is not necessary that there should be a permanent obstruction of the way in order to give a right of action; it is enough if the act is calculated to abridge or interfere with the right. In *Kidgill v. Moor* (*h*), locking a gate across a way was held to be a sufficient obstruction to give the reversioner a right of action. It is enough if, for all substantial purposes, the obstruction is of a permanent character" (*i*). It is to be observed, that in *Baxter v. Taylor*, *supra*, *Taunton* and *Parke*, J.J. (*h*), held that the act complained of would not be evidence of right against the reversioner; and that neither in *Mumford v. Oxford, &c. Railway*

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(*g*) 10 C. B., N. S. 287.

(*h*) 9 C. B. 364.

(*i*) See also per Lord *Tenterden*, J., in *Shadwell v. Hutchinson*, 3 C. & P. 617; per *cnr. Dobson v. Blackmore*, 9 Q. B. 1004. "The declaration must either state something which is necessarily an injury to the reversion, as the cutting down timber trees or the like; or if it state something else, which may or may not be an injury to the reversion, it must go on to aver that the reversionary interest of the plaintiff is thereby injured. When that which is stated *cannot*

be injurious to the reversion, the allegation that the reversion is thereby injured will not help the plaintiff. Where it *must* be an injury to the reversion, that concluding allegation is unnecessary." And where, upon the face of the declaration, it may or may not be an injury to the reversion, the question whether it is permanent is for a jury. See per *Willes*, J., in *The Metropolitan Association, &c. v. Petch*, *ubi sup.*

(*h*) *Parke*, J., at p. 73 of the report.

Remedy by
action at law.

Company or Simpson v Savage was the act a disturbance of an easement (the onus of establishing which, if disputed, would be on the plaintiff), but an injury, not of a permanent kind, to a natural right, which right would *primâ facie* subsist after the determination of the term, and unless the reversioner suffered the injurious acts to continue after the end of the term (*l*), they would not be likely to afford an obstacle, by way of evidence, to the maintenance of the right; for the evidence afforded by them might be rebutted by proof of the subsistence of the tenancy during the continuance of them (*m*); whereas in the case of the disturbance of an easement the proof of its existence is equally affected by acts of interference with the enjoyment of it, whether the dominant tenement has been under lease or not.]

If the disturbance be continued, a fresh action may be maintained from time to time by the persons filling the situation of tenant in possession or reversioner (*n*).*

Party liable to
be sued.

Parties liable to be sued.]—The party creating the disturbance is liable to an action, whether he be the owner of the servient tenement or not (*o*).

(*l*) As to the effect of which, see *Pulk v. Skinner*, 18 Q. B. 575.

(*m*) See the notes upon this subject, ante, pp. 190—196.]

(*n*) *Penruddock's case*, 5 Rep. 101; *Shadwell v. Hutchinson*, 2

B. & Ad. 97; [4 C. & P. 333; *Hatishill v. Itted*, 18 C. B. 696; *Wilson v. Peto*, 6 Moore, 47.]

(*o*) Com. Dig. Action on the Case for a Nuisance, B.; *Wetton v. Dunk*, 4 F. & F. 298.

* In Chancery, the owners of several properties affected by a nuisance might join in suing. If one failed to make out his case, the suit as to him was dismissed with costs. Such costs were deducted from those of the successful plaintiff. (*Umfreville v. Johnson*, L. R., 10 Ch. 580.)

For the continuance of a disturbance, each successive owner in occupation of the servient tenement is liable, though it may have been begun before his estate commenced.

Remedy by
action at law.

Continuing
disturbance.

Where, however, the party was not the original creator of the disturbance, a request must be made to remove it, before any action is brought; but it is sufficient if such request is made to the party in possession, though he be only lessee (*p*). [A request to a former occupier while in possession will suffice (*q*).]*

(*p*) *Penruddock's case*, 5 Rep. W. 176.]
101; *Brent v. Haddon*, Cro. Jac. [(*q*) *Salmon v. Bensley*, Ry.
555; [*Jones v. Williams*, 11 M. & M. 189.]

* That is, if he maintains the erection which is a disturbance of the easement. He is not liable for the act of a stranger which he neither authorized nor adopts. (*Saxby v. Manchester & Sheffield Railw. Co.*, L. R., 4 C. P. 198; *Daniels v. Potter*, 4 C. & P. 262.) It seems that a tenant for years occupying a house, which was an obstruction to light, erected before his tenancy, was not liable to be sued for damages for its continuance, because he had no authority to abate it. (*Hyppon v. Bowles*, Cro. Jac. 373.) But in the case of an area adjoining a highway, which is a nuisance to the public, it is the duty of the occupier for the time being to fence it. By occupying he maintains it. (*Coupland v. Hardingham*, 3 Campb. 398.) So a campshed in front of a wharf, which became dangerous in the time of the owner's predecessor; by succeeding to the benefit and having control over it, it becomes his duty to repair, or give notice of the danger. (*White v. Phillips*, 15 C. B., N. S. 245.) Any one who maintains the nuisance by making use of it, is also liable, though not the occupier of the land on which it is. (*Pickard v. Smith*, 10 C. B., N. S. 470; *Hadley v. Taylor*, L. R., 1 C. P. 53.) A man who has made an excavation in a highway, on condition that he repairs it, and has repaired it, is not liable if it afterwards subsides. (*Hyams v. Webster*, L. R., 2 Q. B. 264; 4 Q. B. 138.) A man is not liable for the negligence of one with whom he has made a contract in carrying out the contract, but a highway surveyor, who agrees with another to do certain works on a road, which create a nuisance if not fenced, and himself superintends the work, and does not contract for the fencing, is bound to fence and responsible for an accident caused by the want of a fence. (*Pendlebury v. Greenhalgh*, L. R., 1 Q. B. D. 36.)

Remedy by
action at law.

If the owner of land on which a nuisance is created lets the land, an action for the continuance will lie, at the option of the party injured, either against the landlord or the tenant (*r*).*

But no such action lies against the landlord for any such act of his tenant done during the continuance of the tenancy (*s*).† And a declaration charging a defendant with the duty of cleansing drains merely “as owner and proprietor” is bad (*t*).

(*r*) *Christian Smith's case*, Sir W. Jones, 272; *Rosewell v. Prior*, 2 Salk. 460; S. C. 1 Ld. Raym. 713; *R. v. Pedly*, 1 A. & E. 822; S. C. 3 Nev. & Man. 627; [*Thompson v. Gibson*, 7 M. & W. 456; and *Todd v. Flight*, 9 C. B., N. S. 377; in which the previous authorities are reviewed; *Mason v. Shrewsbury and Hereford Rail. Co.*, L. R., 6 Q. B. 585.]

(*s*) *Cheetham v. Hampson*, 4 T. R. 318; [*Rich v. Basterfield*, 4 C. B. 783; *Bishop v. Trustees of*

Bedford Charity, 1 E. & E. 697; but see per *Littledale, J.*, *R. v. Pedly*, 1 A. & E. 827.]

(*t*) *Russell v. Shenton*, 3 Q. B. 449, [cited in *Todd v. Flight*, at p. 389; see *Ricdie v. London & N. W. Railw. Co.*, 4 Exch. 244; *Gayford, App.*, *Nicholls, Resp.*, 9 Exch. 702; as to the irresponsibility of the possessor for acts done on the land, without his authority, by persons while there with his permission.]

* The landlord is not liable, if he has taken a covenant to repair from the tenant, because in such case he does not authorize the continuance of the dangerous condition of the premises. (*Pretty v. Bickmore*, L. R., 8 C. P. 401; *Gwinnell v. Eamer*, L. R., 10 C. P. 658. See also *Gandy v. Jubber*, 5 B. & S. 78, 485; 9 B. & S. 15.) If he lets a house in a dangerous state, without making any provision for its repair, he is only liable to strangers, not to his tenant, or the customers or guests of the tenant. (*Robbins v. Jones*, 15 C. B., N. S. 240.)

† *Preston v. Norfolk and Eastern Counties Railway Companies*, 2 H. & N. 735; *Bartlett v. Baker*, 3 H. & C. 153. A man who makes a drain for the use of his tenants, and keeps it in his own possession and allows them to use it, is liable if it becomes a nuisance through their user whilst in his possession. (*Brown v. Russell*, L. R., 3 Q. B. 261.)

(b) *Forms of Action.*

The ancient common law remedies by assize of nuisance, and the writ of *quod permittat prosternere*, had long fallen into disuse before they were abolished by the recent statute for the limitation of actions and suits (*u*).

Remedy by
action at law.

Real actions
abolished.

The modern remedy at law for the disturbance of an easement, is generally [by suing upon counts in the form of] case. Occasionally, the disturbance may be the consequence of a direct act of trespass, and [in such case] there appears to [have been] some room to doubt whether trespass [was] not the only form of action maintainable (*x*). There are, however, authorities from which it seems that in all cases of consequential

Trespass or
case.

(*u*) 3 & 4 Will. 4, c. 27, s. 36. [The rest of this dissertation as to the form of the action is now of little value, except so far as it may enable the reader, by reference to the authorities relating to the form of action, to ascertain what, on a given state of facts, is the nature of the cause of action. It is unnecessary now to elect between the forms of action, trespass and case; for, in the first place, by the Common Law Procedure Act, 1852, s. 3, the plaintiff is relieved of the necessity of naming a form of action in the writ; secondly, by s. 41, he may join any different causes of action in the same suit,—so, if there be any difficulty in determining whether trespass or case be the proper form, he will join both forms; thirdly, supposing he declares in the wrong form, but the facts alleged disclose a cause of action, then, special de-

murrers being abolished (s. 51 of the act), and formalities in general rendered immaterial (s. 50),—indeed in some cases objectionable, as the allegations *vi et armis* and *contra pacem* (s. 49),—an informal count will be sufficient, unless the informality be such as to prejudice, embarrass or delay the fair trial of the action; and even then, the only course open to the defendant is to apply to a judge or the court to strike out or amend the count under s. 52. Besides which, most extensive powers of amendment at any stage of the proceedings are given by s. 222 of the act.]

(*x*) See this subject fully discussed in *Harris v. Ryding*, 5 M. & W. 72. See also *Fay v. Prentice*, 1 C. B. 828; [and, generally, the notes to *Scott v. Shepherd*, 1 Smith, L. C. 407.]

Remedy by
action at law.

Trespass or
case.

injury resulting from a direct act, the party aggrieved has the option of suing either in trespass or in case.

Where the injury results from an act which is partly a trespass, and partly productive of consequential injury only, it is expressly decided that case is maintainable, and it seems that trespass also might be supported.

Wells v. Ody.

[406] In *Wells v. Ody* (*y*), an action on the case was brought for the stoppage of ancient windows, by the erection of a wall. It appeared in evidence that the houses of the plaintiff and defendant were contiguous, and that the defendant had erected a party-wall, which stood partly on his own and partly on the plaintiff's land. A further elevation by the defendant of the party-wall, to form the side of a workshop, had the effect of darkening the plaintiff's ancient windows. One question left by the learned judge (*Parke*, B.) to the jury was, "Whether, supposing the wall to consist only of that part which stood on the plaintiff's land, it would have the same effect as the wall which was actually erected." The jury found that it would. It was then objected on the part of the defendant, that the action should have been in trespass, the part of the wall which was nearest the plaintiff's windows, and therefore the proximate cause of the injury, being erected on the plaintiff's own land, and, consequently, a direct injury to the plaintiff's property.

The verdict was taken for the plaintiff, with liberty to the defendant to move for a nonsuit. A rule having been obtained, it was urged in argument, "That, though trespass might lie, a plaintiff was, in every case, at liberty to waive it, and bring case for the consequential injury." *Branscomb v. Bridges* (*z*), and *Smith v. God-*

(*y*) 1 M. & W. 452.

(*z*) 1 B. & C. 145.

win (a), were cited. The court did not decide the case upon this broad ground, but confined their judgment to the decision, "That where an injury had been done, of a consequential nature, to the comfort and convenience of another, effected partly by an act of trespass, and partly by an act that was not a trespass, but from either of which the injury must and would have resulted, case might be maintained;" and the court also said, that in such a case trespass would lie. "Suppose," said Lord *Abinger*, "a person's premises are injured by the changing of a water-course by the erection of a weir partly on the land of the plaintiff and partly on the land of the defendant, the erection of that which is on the plaintiff's land would be the subject of an action of trespass; and doing the same thing on the defendant's would be the subject of an action on the case. If both acts are done at the same time, and form part of one *res gesta*, and the consequential damage is in respect of both together, it appears to me the plaintiff may bring his action of trespass, or his action on the case. There are not wanting sufficient analogies to show that, where an injury is done to a right of way—in fact, where there is a common injury—there may be a common remedy, and there a party may adopt either." "It appears to me," said *Parke*, B., "that this action is maintainable. This is a wall built partly on the property of the plaintiff, and partly on that of the defendant. The wall is an entire wall, and not separate. Then it appears to me this is a case in which the plaintiff has the option as to the form of action he may choose to adopt, and the more natural and proper remedy is by an action on the case."

Remedy by
action at law.

Trespass or
case.

Wells v. Ody.

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Remedy by
action at law.

It is obvious, that if the principle contended for in argument in the case of *Wells v. Ody*—that a plaintiff may, in all cases, waive the trespass, and sue for the consequential injury—had been recognized as undoubted law, the case might have been at once disposed of, without entering into the refinements upon which the judgment of the court was founded.

Trover affords a similar instance of waiving the tort, and suing for the consequential injury.

Ancient deci-
sions in favour
of right to
elect.

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Modern decisions appear to lean in favour of the election, either to sue for the trespass, or to waive that, and sue for the consequential damage only; and there are ancient authorities bearing on the same subject, to the like effect:—"If I have a house, by prescription, on my soil, another cannot erect his house, on his own soil, so near to my land as to cause the rain to flow from it and fall upon my land" (*b*). "So, if a man erect a house which overhangs my house, this is a nuisance to my house; for, of necessity, the rain must fall from it on my land, and this taketh away my air, and preventeth me building up my house as I lawfully might" (*c*).

In *Whitting v. Beenway* (*d*), it was held, that an action on the case was maintainable against the defendant for having with force and arms erected a certain weir or bank, by means whereof the water of a certain stream overflowed the plaintiffs' meadow: it is there said, that the bank was laid as erected *vi et armis* (*e*), and not the overflowing—which was the injury there complained of.

(*b*) 1 Rolle's Abr. Action on the Case, 107, pl. 17, citing 22 II. 6, 15; 9 Co. 58, *Bland's case*, referred to by *Parke, B.*, in *Wells v. Ody*.

G. pl. 12.

(*d*) 2 Rolle's Rep. 248.

[(*e*) The Common Law Procedure Act, 1852 (s. 49), directs that this and the allegation *contra pacem* should not be made.]

(*c*) 2 Rolle's Abr. 140, *Nusans*,

In Fitz. N. B. (*f*), a similar injury was held to be the subject of an action of trespass.

Remedy by
action at law.

The *Earl of Shrewsbury's case* (*g*) is an important authority on this subject. That was an action on the case, in which the Earl of Shrewsbury declared, setting out his title as Seneschal of Mansfield, and complained, that the defendant with force and arms, prevented him from exercising his said office, and receiving the profits thereto by law belonging; to the writ and declaration it was objected, that they were *vi et armis*; and the books, 43 Ed. 3, 33 c, and 17 Ed. 4, 2, were cited, and F. N. B. 86 H, that an action on the case shall be *vi et armis*; and as to that, it was resolved by the court that the writ and declaration were good enough.

*Earl of
Shrewsbury's
case.*

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“ And a difference was taken betwixt non-feasance and mis-feasance; for non-feasance or negligence shall never be said *vi et armis*, for that would be *oppositum in objecto*; neither for negligence or non-feasance shall the writ say, *contra pacem*. 12 H. 4, 3 a, 45 E. 3, 17 b, 43 E. 3, 33 a. But some writs shall be *contra pacem*, which shall not be *vi et armis*, as 9 H. 6, 1 a. Recaption shall be *contra pacem*, and against the law and the statute, but shall not be *vi et armis*. So, in all actions for a thing done against any statute, the writ shall be *contra pacem*, vide 17 E. 3, 1 a, although it is for non-feasance. But when there are two causes of an action on the case, the one *causa causans*, and the other *causa causata*, *causa causans* may be alleged to be *vi et armis*, for that is not the immediate cause or point of the action, but *causa causata*, as in 12 H. 4, 3 a: the putting of dung into the river is *causa causans*, and, therefore, it

(*f*) Trespass, 87 H.

(*g*) 9 Rep. 46, b.

Remedy by
action at law.

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may be vi et armis, but causa causata, the point of the action on the case, is the drowning of the plaintiff's land. So, in R. 2, Hosteler, 7, Register, 105 a, the breaking of the inn may be alleged vi et armis; for defectus custodiæ is the point of the action on the case against the hostler, M. 29 E. 3, 18 b. The Abbott of Evesham brought an action on the case against certain persons, and declared that he had a fair in S. with all that belonged to a fair, and that the defendant with force and arms disturbed the people coming to the fair (which was causa causans), by which the plaintiff lost his toll (which was causa causata), the point of the action, and the action maintainable. Vide 16 E. 4, 7 a, b; F. N. B. 89 M.; 19 R. 2, tit. Action sur le Case, 52. So, in the case at bar, the defendants might, vi et armis, hinder or interrupt the plaintiff in exercising the office, and that is causa causans, by which he loses his fees, &c., and that is causa causata, the point of the action, 7 H. 4, 44 b. If an action on the case has sufficient matter, although it has matter impertinent also, yet it shall be maintainable."

*Pitts v.
Guince.*

In *Pitts v. Guince and another* (h), the declaration stated, that the plaintiff was master of a ship, which was laden and ready to sail, and that defendant entered and seized the ship, and detained the ship. It was objected that the action should have been in trespass; and 4 Ed. 3, 24; Palmer, 47; 13 H. 7, 26, were cited as authorities. Holt, C. J., said, "The master only declares as a particular officer, and could only recover for his particular loss; yet he might have brought trespass as a bailiff of goods may, and then, as a bailiff, he could only have declared upon his possession, so that he

(h) Salk. 10.

was possessed, which is enough to maintain trespass." Judgment pro querente.

Remedy by action at law.

So, in *Mikes v. Caly* (i), it was held, that an action on the case would lie by the master of a ship against the officers of a corporation for wrongfully distraining his cargo, whereby he lost his voyage, Lord *Holt* expressly stating, "that he might have trespass or case, at his election."

Where the injury has been caused partly by misfeasance, and partly by non-feasance, it seems to have been clearly settled, that an action on the case may be maintained (k); there are, however, cases in which it has been held, that case would lie, though the injury complained of was the immediate result of the wrongful act of the defendant (l).

Case will lie where injury caused partly by mis-feasance and partly by non-feasance.

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From these authorities it appears to be clear, that there are many instances of actions on the case [for damage occasioned by force].

[In actions for the disturbance of easements, writs of injunction against the repetition or continuance of the injury may now be granted by the common law courts or judges, and may be claimed in the writ and declaration or ex parte (m).]

(i) 12 Mod. 381.

(k) *Scott v. Shepherd*, 2 W. Blackstone, 807; *Ogle v. Barnes and others*, 8 T. R. 188; *Branscomb v. Bridges*, 1 B. & C. 145; *Moreton v. Hardern*, 4 B. & C. 223.

(l) *Williams v. Holland*, 10 Bing. 112; and cases there cited; *Smith v. Goodwin*, 4 B. & Ad. 413; *Wells v. Ody*, per *Parke*, B. supra, p. 663.

In *Dantrie v. Dee*, 2 Rolle, Rep.

139, the court held the declaration bad, because it contained two distinct causes of action—one, "the breaking open and carrying away the piers," the subject of an action of trespass; the other, "the locking up the plaintiff's own pew, *per quod* he could not sit there to hear divine service," the subject of an action on the case. [But see ante, p. 661, n. (u).]

[(m) See the Common Law Procedure Act, 1854, 17 & 18 Vict.

Remedy by
action at law.

Allegation of
title in the
declaration.

*Tebbutt v.
Selby.*

(c) *Pleadings in Actions for Disturbance (n).*

The Declaration—The Allegation of Title.—Whenever a plaintiff claims more than he is entitled to of common right, he must allege in his declaration, that—he ought to have that which he demands (o).

Thus, in a recent case (p), the declaration stated that the plaintiff was possessed of certain rooms in a dwelling-house, and in respect thereof was entitled to an easement to take water from a cistern, and that defendant wrongfully, &c. “locked and fastened, and caused and procured to be locked and fastened up, a certain door and doorway, situate and being in the said dwelling-house, and leading to the said cistern, and kept and continued the same so locked and fastened up for a long space of time, to wit, &c., and thereby, for and during all that time, continually hindered and prevented the plaintiff and his family from having access to the said cistern, and absolutely prevented plaintiff and his said family from taking any water from the said cistern, and wholly excluded them from the use, benefit and enjoyment of the same; and plaintiff and his family, by means of the premises, could not, during any part of the time aforesaid, obtain water from the

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c. 125, ss. 79–82. The discussion of these sections must be left to the general treatises on practice. For cases decided upon them, see *Jessel v. Chaplin*, 2 Jur., N. S. 931; *De La Rue v. Fortescue*, 2 H. & N. 324; *Curnes v. Nesbitt*, 7 H. & N. 158, 778; and also *Shaw v. Stenton*, 2 H. & N. 858.]

[(n) The importance of such rules of pleading as peculiarly relate to easements has been diminished by the C. L. P. Act, 1852,

and to so great an extent as to render mere points of pleading scarcely worthy of discussion in this treatise; consequently, it has been thought desirable in the present edition to abstain from adding largely to this chapter.]

(o) *Wyatt v. Harrison*, 3 B. & Ad. 871; [*Laing v. Whaley*, 3 H. & N. 675, 901.]

(p) *Tebbutt v. Selby*, 6 A. & E. 786.

said cistern, nor have the use and benefit of the same, as they of right, &c.”

Remedy by
action at law.

After verdict for the plaintiff upon an issue traversing the right to the cistern, the court arrested the judgment, upon the ground, “that the issues having passed over the question of right to the doorway, no facts could be intended, and that the judgment must be taken as to this point, as if it were by default or on general demurrer; and though if the declaration had alleged generally a right to use the cistern, and had complained that that right was interrupted, it might have been good; yet, as it had stated the particular mode of obstruction, by fastening the door, the plaintiff was bound to allege a right to pass through the door;” and the fastening was assimilated to a common obstruction to a way, where the right to use the way should appear. “The plaintiff,” said Lord *Denman*, “is prevented from going where he is not shown to have a right to go, in order to get to a place where he has a right to go” (q).

In some early authorities a distinction is taken as to the mode of alleging title in actions against strangers and in actions against the terretenant of the servient tenement: in the former case it was admitted that a general allegation, “that he had and ought to have the right claimed,” was sufficient; while in the latter case it was said, that a title by grant or prescription must be

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[(q) In *Laing v. Whaley*, 3 H. & N. 675, 901, a count, for polluting the water of a canal which supplied boilers on the plaintiff's land, alleged “that the plaintiff enjoyed the benefit of the water for that purpose, and that the water used and ought to run and

flow without being fouled and polluted,” but was held bad on arrest of judgment, on the ground that it did not show that the plaintiffs were entitled to the flow or enjoyment of the benefit of the water.]

Remedy by action at law. shown, it being an attempt "to put a charge upon" the defendant (*r*).

General allegation in all cases sufficient. It appears, however, to be now clearly settled, that in all cases, whether the action be brought against the servient owner, or a stranger, a general allegation of right is sufficient (*s*).

It [was formerly] usual in practice (*t*), in declaring for a disturbance of continuous easements, as rights to light and support, to allege antiquity of enjoyment; although such an allegation may possibly, in some cases, be operative where the general claim of right is omitted (*u*); yet, if the latter be inserted, there is no more reason for requiring a specific description of title in these instances than in the case of a way (*x*) or water-course (*y*); and it has accordingly been decided that, in an action for stopping light, a declaration, alleging that the plaintiff was possessed of a house in which he ought to have such and such lights, was good on demurrer (*z*).

[414] Where the plaintiff claims under a disposition of the owner of two tenements (as in the case of *Compton v. Richards* (*a*)), such allegation of antiquity must be omitted; or, if inserted, must be treated as immaterial.

In actions by the reversioner, he must show that he

(*r*) *St. John v. Moody*, 3 Keble, 528, S. C. 531; *Blockley v. Slater*, 1 Lutw. 119; *Winford v. Wollaston*, 3 Levinz, 266.

(*s*) *Tenant v. Goldwin*, 1 Salk. 360; S. C. 2 Id. Raym. 1089; *Rider v. Smith*, 3 T. R. 766; 2 Wins. Saund. 113 a, note; 2 Notes to Saund. 361; Com. Dig. Pleader (C. 39); see, also, *Trower v. Chadwick*, 3 Scott, 699; 3 Bing. N. C. 334.

[(*t*) This practice has ceased.]

(*u*) Com. Dig. Prescription, H.; *Wyatt v. Harrison*, 3 B. & Ad. 871.

(*x*) *Blockley v. Slater*, 1 Lut. 119.

(*y*) *Sundys v. Trefusis*, Cro. Car. 575; [see the form given by the C. L. P. Act, 1852, Sched. B. f. 30, of a declaration for diverting a watercourse.]

(*z*) *Villers v. Ball*, 1 Shower, 7.

(*a*) 1 Price, 27; ante, p. 121.

sues in that capacity, and allege that the disturbance is to the injury of his reversionary estate (*b*).

Remedy by
action at law.

As the right to an easement exists in respect of the dominant tenement, the declaration usually states the possession of the tenement by the plaintiff, and that by reason thereof he was entitled to the right for the disturbance of which the action is brought.

Description
of right.

[In actions for taking away support from houses, counts not averring title at all, but not disclosing any right on the part of the defendant, have been held good, on the ground that the mere enjoyment of support is sufficient title against a wrong-doer (*c*). In actions for damage to land by removal of support, it is unnecessary to allege title, because the right violated is not an easement, but an ordinary and presumable incident of property (*d*); and if a modern house is damaged by the subsidence of the land, caused by the removal of the support, and the subsidence would have taken place though the house had not existed, then it should seem that compensation for damage to the house may be recovered under a count for injury in respect of the land, merely claiming compensation for damage to the house by way of damages (*e*).]

A right of way may be alleged to be appurtenant to the dominant tenement (*f*).

“However, although the plaintiff is at liberty to declare upon his possession generally, yet if he under-

(*b*) *Jackson v. Pesked*, 1 M. & Sel. 234; [see ante, p. 657, n. (*i*), the passage cited from the judgment of *Willes*, J.]

[(*c*) *Jeffries v. Williams*, 5 Exch. 792; *Bibby v. Carter*, 4 H.

& N. 153; see *Hilton v. Whitehead*, 12 Q. B. 734.

(*d*) See ante, pp. 358, 360.

(*e*) See *Brown v. Robins*, 4 H. & N. 186; and ante, p. 360.]

(*f*) *Bright v. Walker*, 1 Cr. M & Ros. 211.

Remedy by
action at law.

takes to set out a title, and does it insufficiently, the declaration is bad" (*g*). If, however, the title, as stated on the face of the declaration, is good, it has been said that the plaintiff is not bound to prove the same title as he has set out in his declaration (*h*), "for the disturbance is the gist of the action, and the title is only inducement, and cannot be traversed." He must prove the same right, but he need not prove the same title (*i*).

Frankum v.
Lord Ful-
mouth.

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In *Frankum v. Lord Fulmouth* (*h*), the plaintiff alleged that he was possessed of a certain mill, "and by reason thereof had, and of right ought to have, a certain water-course, which had been used and accustomed to flow, and still of right ought to flow, to it." The defendant traversed the plaintiff's right to the water modo et formâ.

It appeared, at the trial, that the stream was an ancient stream, but that the mill had not been built more than fourteen years. *Alderson*, B., held that this evidence did not support the right claimed, and refused to amend the record, on the ground that such amendment would cause a material alteration in the issues; he, however, directed the jury to find the facts specially; and the special finding was indorsed on the record, under the 3 & 4 Will. 4, c. 42, s. 4. The Court of King's Bench,

(*g*) 1 Wms. Saund. 346 a; 1 Notes to Saund. 625; *Dorne v. Cashford*, 1 Salk. 363; *Crowther v. Oldfield*, 2 Ld. Raym. 1230.

(*h*) 1 Wms. Saunders, 346 a; 1 Notes to Saund. 625.

(*i*) Buller, N. P. 76; *Ferrer v. Johnson*, Cro. Eliz. 335. Proof of a larger easement than that alleged will support the declaration. *Duncan v. Louch*, 6 Q. B. 914;

[1 Smith, L. C., notes to *Bristow v. Wright*, 5th ed. 589. Variances are now so liberally amended under the C. L. P. Act, 1852, that this subject of variance has ceased to be of sufficient importance to warrant a further discussion of it in this work.]

(*k*) 2 A. & E. 452; S. C. 4 Nev. & Man. 330.

on motion, agreed with the learned judge, and refused a rule to enter judgment for the plaintiff. The court said, "The variance was material, and the defendant might have prepared his defence to meet the claim made in respect of the mill, and not of the land."

Remedy by
action at law.

The real ground of this decision appears to have been, that not only was the title different, but the right proved was altogether a different one from that stated in the declaration. The right proved was to the flow of the stream in its accustomed course; in other words, to the natural easement. The right alleged was in respect of an appropriation, which, to confer a title, must have been ancient, and might have been in derogation of the natural easement, and, at all events, was totally irrespective of it.

Principle of
that decision.

By the recent statute, in all actions upon the case, and other pleadings wherein the party claiming may "now, by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in this act mentioned and provided shall be admissible in evidence, to sustain or rebut such allegation" (s. 5).

Prescription
Act.

[416]

The plaintiff [should] describe in his declaration the nature of the right, in the enjoyment of which he has been disturbed—thus in an action for the disturbance of a way he [should] state the *terminus a quo* and *ad quem*, and the kind of way he claims, as a footway (1), &c.; but a precise local description, as by alleging the land to be in any particular place, is not requisite—

(1) Vide Com. Dig. Action on the Case for a Disturbance, B. (1); Chimin, D. (2).

Remedy by
action at law. [should not be given], nor should the intervening closes
[be mentioned] (*m*).

Allegation of
breach of duty.

Of the Statement of the Breach.]—In an action on the case for a disturbance, it is sufficient to allege a disturbance generally, without showing the particular manner of the disturbance (*n*).

[417] “I incline to think,” said Lord *Elleborough* (*o*), “that the gravamen need not be described with any local certainty. A plaintiff in such an action may indeed make it necessary to prove the gravamen in a particular place, by giving it a specific local description, as by alleging the nuisance as standing and being in a certain place, particularly described; but in general such particularity is not necessary.” “It is sufficient to describe the substance of the injury, in order to give the other party notice of what he is to defend.”

“It would have been sufficient,” said *Le Blanc*, J., “to have stated that they diverted the water above the navigation of the plaintiffs, by means of which the injury complained of happened.”

In the recent case of *Tebbutt v. Selby, Patteson, J.*, appears to have doubted whether such a general allegation of obstruction would be sufficient (*p*).

Venue.

In all actions for the disturbance of an easement, the venue is local (*q*), but, as in other cases of local actions,

(*m*) *Simpson v. Lenthwaite*, 3 B. & Adol. 226; [see the Common Law Procedure Act, 1852, Sched. (B.), form 46. That Act extinguished the right to demur on the ground of uncertainty.]

(*n*) Com. Dig. Action on the Case for a Disturbance, B. (1); *Anon.*, 3 Leon. 13; *Danney v.*

Dee, Cro. Jac. 604.

(*o*) *Mersey and Irwell Navigation v. Douglas*, 2 East, 497.

(*p*) 6 A. & E. 793. [In the form of declaration given by the Common Law Procedure Act, 1852, Sched. (B.), 30, the manner of the disturbance is stated.]

(*q*) Com. Dig. Action, N. 8.

it may be changed after issue joined, though not before (*r*), by order of the court or a judge (*s*).*

Remedy by
action at law.

Of the Plea.—Previous to the modification of the Pleas. rules of pleading, [in H. T., 4 Will. 4,] the plea of the general issue in an action on the case, in addition to traversing the whole declaration, was sufficiently comprehensive to let in almost every possible defence.

By the new rules [of pleading (T. T., 1853, r. 16) (*t*)], New rules. the plea of not guilty in actions [for torts] “shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible [under that plea]; all other pleas, or denial, shall take issue on some particular matter of fact alleged in the declaration.”

“*Ex. gr.* In an action for a nuisance to the occupation of a house by carrying on an offensive trade, the [418] plea of not guilty will operate only as a denial that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff’s occupation of the house.

“In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff’s right of way.”

In *Frankum v. Lord Falmouth* (*u*), the declaration *Frankum v.*
Lord Fal-
mouth.

(*r*) *Bell v. Harrison*, 2 C. M. & R. 733. same as one of H. T., 4 Will. 4.] (*u*) 2 A. & E. 452; S. C. 4 Nev.

(*s*) 3 & 4 Will. 4, c. 42, s. 22. & Man. 330.

[(*t*) This rule is substantially the

* Abolished by Judicature Act, 1875 (38 & 39 Vict. c. 77, Sched. Ord. XXXVI. rule 1).

Remedy by
action at law.

set out that the plaintiff was possessed of a water grist mill, and by reason thereof ought to have had and enjoyed the water of a certain stream flowing to the said mill. The breach alleged that the defendant "wrongfully and injuriously diverted the stream," &c. The fact of the diversion having been proved, it was held, that the plea of not guilty to the allegation of "wrongfully and injuriously diverting" did not put the title in issue, and that the plaintiff was therefore entitled to a verdict.

Dukes v. Gostling.

So in *Dukes v. Gostling* (*x*), in an action for disturbing a right of way, it was held that the plea of not guilty put in issue the fact of obstruction only, and admitted the inducement, as stated in the declaration.

Traverse of
right.

Manning v. Wasdale.

If the defendant relies upon a loss of the easement—for the disturbance of which the action is brought—by the plaintiff's non-user, such non-user must be pleaded according to its legal effect (*y*). In this case he ought to traverse the plaintiff's right (*z*).

[419] (d) *Of the Pleadings where Tort is justified under an Easement.*

Justification
under case-
ment.

The pleadings hitherto considered have been those used in actions brought for the disturbance of an easement. The pleadings in actions in which the defendant justifies the act complained of by virtue of an easement, present greater difficulties.

(*x*) 1 Bing. N. C. 588; S. C. 1 Scott, 750. See *Trower v. Chadwick*, 3 Scott, 699; S. C. 3 Bing. N. C. 334.

(*y*) *Manning v. Wasdale*, 5 A. & E. 758.

[(*z*) See *Renshaw v. Bean*, 18 Q. B. 112.]

The defendant suffers from the operation of the inveterate rule of pleading, which requires greater certainty and precision in the plea than in the declaration (*a*).

Justification
under ease-
ment.

Certainty of
allegation in
pleas.

In a declaration for a disturbance to an easement, it has been already seen that a general allegation of title is sufficient (*b*). In a plea justifying by virtue of such a right, the title to the right must be set out formally.

So long as the distinction existed between the mode of stating title in actions against a wrong-doer and against the terre-tenant, this rule was consistent; but it is somewhat difficult to see why, in an action against a terre-tenant seeking to impose a burthen upon him, a greater degree of laxity should have been permitted to the claimant, when alleging his right, than when defending himself under it. In either case, the title under which he claims is equally within his own knowledge.

Inconsistency
of rule.

It is clearly established, that, in a plea justifying the act complained of under an easement, the particular title upon which the defendant relies, whether by grant or prescription, or by user under the statute, must be set out.

Particular
title must be
pleaded.

[420]

If the defendant justifies at common law, whether by grant expressed or implied, as by prescription or otherwise, he must show that the easement has been annexed to the fee in the dominant tenement: and if he cannot allege himself to be the owner of the fee, he must deduce the title to his own particular estate (*c*).

(*a*) *Grimstead v. Marlone*, 4 T. R. 717; 1 Wms. Saund. 346, n.; 1 Notes to Saund. 624.

(*b*) Vide *supra*, p. 670.

(*c*) See Com. Dig. Chimin, D. 2; Stephen on Pleading, 3rd ed. 805,

Justification
under ease-
ment.

In justifying under a prescriptive right of way the termini [should be set out], but the intervening closes over which the way passes should [not] be mentioned (*d*); and this is equally the case, though one of the intervening closes is shown to be in the defendant's own occupation (*e*).

Prescription
Act.

By the Prescription Act it is declared, "that in all pleadings to actions of trespass, and in all other pleadings, wherein before the passing of this act it would have been necessary to have alleged the right to have existed from time immemorial, it shall be sufficient to

General allega-
tion of enjoy-
ment.

allege the enjoyment thereof as of right by the occupier of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely upon any proviso, exception, incapacity, disability, contract, agreement, or other matter herein-
[421] before mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation" (s. 5).

Periods of en-
joyment.

The periods, (twenty or forty years,) herein mentioned, must be those immediately preceding the bring-

Rule 5; [6th ed. 231]; 1 Wms. Saund. 346 a; 1 Notes to Saund. 624; *Bird v. Dickinson*, 2 Lut. 1526; per *Cleridge, J.*, in *Bailey v. Appleyard*, 8 A. & E. 167.

(*d*) See [the form of plea in Sched. (B.) of the Common Law

Procedure Act, 1852; and] per *Dodderidge, J.*, in *Sloman v. West*, cited 1 East, 380; *Simpson v. Lenthwaite*, 3 B. & Ad. 226.

(*e*) *Jackson v. Shillito*, cited in *Wright v. Rattray*, 1 East, 381.

ing of some suit or action in which the claim shall be brought in question (*f*). The plea need not state the enjoyment to have been had during the requisite period "next" before the action brought, such words being nothing more than an exposition of the proof required to establish "the right" (*g*); but if the words "next before" are used, the enjoyment must be alleged with reference to the bringing of the action, and not to the commission of the acts complained of (*h*).

Justification
under easement.

A plea under the statute must state the enjoyment to have been "as of right," or it will be bad in arrest of judgment (*i*), [except in the case of lights.]

Such a plea [should] state the enjoyment to have been without interruption (*h*). Under a plea of forty years' user, according to the statute, evidence of what took place before that period is admissible as showing the state of things at the commencement of the forty years' enjoyment (*l*).

In pleading at common law a right to an easement by a modern lost grant, both the date and parties to the supposed instrument must [formerly have been] set out, [but should not be now] (*m*).

Pleas at common law.

There appears to be no precedent for a plea of an Disposition of-

(*f*) *Monmouth Canal Company v. Harford*, 1 C. M. & R. 614; *Tickle v. Brown*, 4 A. & E. 369; *Wright v. Williams*, 1 M. & W. 77; [*Richards v. Fry*, 7 A. & E. 698; *Ward v. Robins*, 15 M. & W. 242; *Lowe v. Carpenter*, 6 Exch. 825.]

(*g*) *Jones v. Price*, 3 Scott, 376; S. C. 3 Bing. N. C. 52; [the Common Law Procedure Act, 1852, Sched. (B.), form 46.]

(*h*) *Richards v. Fry*, 3 Nev. &

P. 67; [7 A. & E. 698, S. C.]

(*i*) *Holford v. Hankinson*, 5 Q. B. 584.

(*k*) [Common Law Procedure Act, 1852, Sched. (B.), form 46; but see] per *Patteson, J.*, in *Richards v. Fry*, 3 Nev. & P. 67.

(*l*) *Lamson v. Langley*, 4 A. & E. 890.

(*m*) *Hendy v. Stephenson*, 10 East, 55; [C. L. P. Act, 1852, ss. 49, 51.]

Justification under ease- ment.	easement arising from the disposition of the owner of two tenements; but it should seem that, as in the easements of necessity, the right must be pleaded as arising by implied grant from the joint owner at the time of severance. The plea might allege the joint ownership and subsequent conveyance to the defendant, and aver the apparent and continuous nature of the easement, and its existence at the period of severance.
owner of two tenements. [422]	
Necessity.	The plea of an easement of necessity must, in like manner, allege the joint ownership at the time of the conveyance, and that the easement is essential to the full enjoyment of the principal thing conveyed or reserved (<i>n</i>).
Distribution of plea.	By one of the rules of II. T. 4 W. 4, it was declared, that "Where in an action of trespass quare clausum fregit, the defendant pleads a right of way with carriages and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified."
	And in all actions in which such right of way or other similar right is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.
	This was held to apply to the case of a trespass committed on three closes, where no evidence of title was given as to one of them (<i>o</i>); and to a claim of right to
	[(<i>n</i>) <i>Proctor v. Hodgson</i>, 10 Exch. 824.] (<i>o</i>) <i>Phythian v. White</i>, 1 M. & W. 216.

pass and repass for the purpose of carrying water and goods, where the jury found for the defendant as to the former but negatived the latter right (*p*); but not to a case where, on issue joined on a plea of right of way with carts, carriages, horses, and on foot, at all times, over the locus in quo, the jury found that the defendant had a right of way for the purpose of carting timber only (*q*).

Justification
under ease-
ment.

Distribution
of plea.

[423]

[A plea of prescriptive right in respect of a mill to use the water of a canal for generating steam in it, was held divisible, one part of the mill being new and the other old (*r*).

The above rule was repealed by the rules of pleading of H. T. 1853, in consequence of its having been rendered superfluous by the C. L. P. Act, 1852, s. 75, which extended it, by enacting that "pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be construed distributively; and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be answered" (*s*).]

Before the new rules of pleading there would have been no necessity to plead specially a justification [to a count in case] for a nuisance; now, however, a party

Nuisance.

(*p*) *Knight v. Woore*, 3 Scott, 326; S. C. 3 Bing. N. C. 3.

(*q*) *Higham v. Rabett*, 5 Bing. N. C. 622; S. C. 7 Scott, 827; [See 1 Smith, L. C. 5th ed., notes

to *Bristow v. Wright*, 558—560.]

[(*r*) *Rochdale, &c. Company, v. Radcliffe*, 18 Q. B. 287.

(*s*) See 1 Smith, L. C. ubi sup.]

Justification
under ease-
ment.

justifying under an easement to carry on an offensive trade must state his title with the same particularity as in actions of trespass (*t*).

The plea of not guilty, since the new rules, puts in issue the fact of nuisance, and that the defendant caused it (*u*).

Equitable
defence. *z*

[Matters which in Chancery would entitle the defendant to an unconditional and perpetual injunction to restrain the action, are now available in the common law courts in answer to the action, and may be pleaded by way of equitable defence (*x*).

Of the Replication.—[The difficulty of selecting the proper form of replication has been removed by the Common Law Procedure Act, 1852, which enables the plaintiff to reply several matters,—to traverse generally, or, admitting part of the plea, to deny the rest, and to reply by joining issue with the effect of denying the substance of the plea.

The replication by joinder of issue is a substitute for the old replication *de injuriâ*, and puts in issue the same averments only. Thus, being replied, in an action of trespass, to a plea of prescriptive right, it was held not to put in issue the allegations that the acts complained of were done in the exercise of the right (*y*).

(*t*) [And the plea is defective if it fails to show that the plaintiff's land has been actually affected for the period relied on. *Flight v. Thomas*, 10 A. & E. 590; *Murgatroyd v. Robinson*, 7 E. & B. 391;] *Blackett v. Bradley*, 1 B. & S. 940.

(*u*) *Dawson v. Moore*, 7 Car. & P. 25. [See *Norton v. Scholefield*,

9 M. & W. 665. It does not put in issue the lawfulness of the act complained of, though alleged in the count to have been committed "wrongfully." *Frankum v. Lord Fulmouth*, 2 A. & E. 452.]

[(*x*) See *Davies v. Marshall*, 10 C. B., N. S. 697.]

[(*y*) *Glover v. Dixon*, 9 Exch. 158.]

If the defendant justifies under a prescriptive title and] the plaintiff does not contest the defendant's right, as stated in the plea, but contends that the acts complained of were not done in pursuance of the right; as for instance, if a way has been used, not for the convenience of the dominant tenement, but for other tenements belonging to the same owner, [or if a right to pollute to a certain extent has been exceeded,] such excess must be new assigned (z).*

Justification
under case-
ment.

New assign-
ment.

[424]

By the 5th section of the Prescription Act, already cited, "any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, shall be specially alleged and set forth."

Replication
under Pre-
scription Act.

Upon this clause it has been decided, in the case of *Tickle v. Brown* (a), that where a defendant justifies under an enjoyment of twenty or forty years, if the plaintiff relies upon a license covering the whole of that period, he must reply such license specially, but a license granted and acted on during the period may be given in evidence under the general traverse of the enjoyment "during the period alleged, showing that there was not, at the time when the agreement was made, an enjoyment as of right; and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years."

In *Beasley v. Clarke* (b), *Tindal*, C. J., said:—

[(z) *Stott v. Stott*, 16 East, 348; (a) 4 A. & E. 369.
Moore v. Webb, 1 C. B., N. S. 673, (b) 3 Scott, 258; 2 Bing. N. C.
675; *Rochdale Canal Company* 705.
v. Radcliffe, 18 Q. B. 287.]

* By the Judicature Act, 1875, Sched. Ord. XIX. rule 14, no new assignment shall be necessary or used. The matter is to be introduced by amendment into the statement of claim.

Justification
under ease-
ment.

Replication
under Pre-
scription Act.

[425]

“ Under a replication, denying that the defendant had used the way for forty years as of right, and without interruption, the plaintiff is at liberty to show the character and description of the user and enjoyment of the way during any part of the time—as, that it was used by stealth, and in the absence of the occupier of the close, and without his knowledge; or that it was merely a precarious enjoyment by leave and license, or any other circumstances which negative that it was an user or enjoyment under a claim of right; the words of the 5th section, not inconsistent with the simple fact of ‘enjoyment,’ being referable, as we understand the statute, to the fact of enjoyment as before stated in the act, viz. an enjoyment claimed and exercised as of right.”

In *Onley v. Gardiner* (c), the Court of Exchequer decided that unity of actual possession was inconsistent with the simple fact of enjoyment as of right, and, therefore, need not be specially pleaded. The simple fact of enjoyment, referred to in the 5th section, is an enjoyment as of right; and proof that there was an occasional unity of actual possession is as much in denial of that allegation, as the occasionally asking permission would be; [because the enjoyment during the unity of possession could not be an enjoyment as of an easement.

The disabilities and exceptions mentioned in the 7th and 8th sections must be specially replied to a plea under the act (d), so must the fact that the enjoyment was under a statutory right, which ceased before the

(c) 4 M. & W. 498.

[(d) *Pye v. Mumford*, 11 Q. B. 666.

expiration of the required period of enjoyment (*e*), or that the servient owner and his agents were absent from the neighbourhood and ignorant of the enjoyment during the whole period (*f*), or, in short, any other facts which would rebut the inference of a right by prescription or grant. The 7th and 8th sections only apply to the affirmative easements included in the 2nd section, so that a replication under those sections to a plea, claiming an easement of light by virtue of twenty years' enjoyment, would be bad.]

Justification
under ease-
ment.

Replication
under Pre-
scription Act.

In pleadings at common law, it appears to have been held, that a prescription might have been avoided by an allegation of unity of possession, without a traverse; on the ground that it was not a bare matter of fact, but intermixed with matter of law (*g*). Thus, in 5 H. 7, 14, it is said, "Where one shall make justification for rent, and by prescription, the plea shall say and allege a unity of possession in his (the plaintiff's) hand, or in his ancestor, or in another, through whom he claims, and shall take no traverse to the prescription; and yet the prescription is alleged to have continued all time (*tout temps*), which cannot be, if there was unity of possession, which is contrary, and in the affirmative, and still he shall take no traverse; and the cause is, for that there is a difficulty for the jurors; and it is matter in law, whether, notwithstanding the unity of possession, the rent continues or not. The same is the law, where one prescribes for a common, unity of possession is a good plea."

Prescription
avoided with-
out traverse at
common law.

(*e*) *Kinloch v. Nevile*, 6 M. & W. 795.

(*g*) *Hussey v. Jacob*, 1 Lord Raym. 88.

(*f*) See sect. 1 of the act.]

Justification
under ease-
ment.

Rejoinder
under Pre-
scription Act.

[*Rejoinder.*]—If to a plea of user for twenty years, or for forty years, a tenancy for life is replied, and there has been a user for the one or other of those periods named in the plea, in addition to the period of the tenancy, the defendant should rejoin that fact.

Although the plea alleged an enjoyment “next before the suit,” such rejoinder would be good (*h*).]*

(*h*) *Clayton v. Corby*, 2 Q. B. *Mumford*, 11 Q. B. 666, ante, p. 813; 2 Gale & D. 182; *Pye v.* 181.

Fusion of Law
and Equity.

* By the provisions of the Common Law Procedure Act, 1854, giving the common law courts power to issue injunctions and receive equitable defences, and by 21 & 22 Vict. c. 27 (Cairns' Act), s. 2, giving Chancery power to award damages either in addition or substitution for an injunction, approaches were made towards giving concurrent jurisdiction to courts of law and equity, in most cases relating to easements. There were still cases in which a plaintiff had to choose the proper court at his peril. The foundation of the common law jurisdiction was damages, and the injunction was an incidental process. If no actionable wrong had been committed, the plaintiff could not go there; so if his right was an equitable right. Again, if the defendant had an equitable answer to the plaintiff's claim, subject to any condition to be performed by him, a court of law would not relieve him. Equity could grant an injunction in anticipation of a legal injury, but would not award him damages when the injury was not substantial enough to entitle him to an injunction.

Damages in
lieu of injunc-
tion.

Equity also had a very important power by Cairns' Act, not possessed by the courts of law, of awarding damages in substitution for an injunction, or, in other words, of awarding the value of the easement, or of a permanent license to infringe it, as on a sale by the dominant to the servient owner. (*Senior v. Pawson*, L. R., 3 Eq. 334; *Viscountess Gort v. Clark*, 3 W. N. 93; *City of London Brewery Co. v. Tennant*, L. R., 9 Ch. 219.) And they awarded such damages in lieu of an injunction if the plaintiff had expressed his willingness to take reasonable damages (*Senior v. Pawson* and *Gort v. Clark*), or if the defendant's building was completed and the plaintiff did not ask for a mandatory injunction (*Martin v. Headon*, L. R., 2 Eq. 425); or if the building was complete before suit commenced, except in very special cases. (*City of London Brewery Co. v. Tennant*, and *Aynsley v. Glover*, L. R., 18 Eq. 553.) In *Cranford v. Hornsea Brick Co.* (11

§ 2.—*Remedy by Suit in Equity.*

[The remedy which was afforded at law, before the passing of the Common Law Procedure Act, 1854, (17 & 18 Vict. c. 125,) for the continuous disturbance of easements or other nuisances, by an indefinite series of actions, was obviously, in many cases, quite inadequate ; and the Court of Chancery has always exercised, and still exercises, the power of interfering, by injunction, to stop the whole mischief complained of.

The foundation of the plaintiff's right in such cases being a right at common law, the Court of Chancery, before finally granting equitable relief, required that the legal right of the person seeking relief should be estab-

Remedy by
suit in equity.

[426]

General rule as
to interference
by Courts of
Equity.

W. N. 28), *Malins*, V.-C., awarded 250*l.* damages to a tenant in fee in lieu of an injunction against brick burning as sufficient to cover the depreciation in the value of the house and the expence of the plaintiff's removal.

By the Judicature Act, 1873 (36 & 37 Vict. c. 66), all jurisdiction of the Court of Chancery and of the common law courts has been transferred to the High Court of Justice (s. 16), which is to administer law and equity concurrently (s. 24); and where there is any conflict between the rules of equity and common law the rules of equity are to prevail (s. 25), and by the Act of 1875 new rules of pleading and forms are provided. These acts supersede the old forms of proceeding, and do away with the distinction between equity and law in disputes respecting easements. Either the chancery division or those divisions which represent and are called after the old common law courts have equal power to award damages, and the remedy by injunction, to enforce equitable rights, and receive and carry out equitable defences. So far as the Supreme Court is concerned equity has ceased to be what it formerly was,—a concurrent jurisdiction mitigating the rigour of the law,—and has become a part or amendment of the law.

Judicature
Acts.

By 30 & 31 Vict. c. 142, s. 12, the county courts have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditaments comes in question, in the case of an easement or license where neither the value nor reserved rent of the lands, tenements or hereditaments in respect of which the easement or license is claimed, or on, through or over or under which such easement or license is claimed, exceeds 20*l.* by the year.

County court
jurisdiction.

Remedy by
suit in equity.

lished in a proceeding at law (*i*), but that court is now empowered to determine the legal right itself (15 & 16 Vict. c. 86, s. 62). It never was a ground of demurrer that the legal right had not yet been tried, though it was a ground for not granting an interlocutory injunction. Sometimes it is desirable to obtain an interlocutory injunction pending the decision of the legal question, and it is as to this class of injunctions that the learned author observed in the last edition of this work, that] as a general rule, courts of equity will interfere by injunction in those cases of disturbance of easements only—where the right of the party complaining is clearly established, and the injury which he must necessarily sustain, if the work be allowed to proceed, is of such a nature that no adequate compensation can be afforded by damages only, and “when delay itself would be a wrong” (*h*).

“The leading principle,” said Lord *Brougham*, in *Blakemore v. Glamorganshire Canal Navigation* (*l*), “on which I proceed, in dealing with this application—the principle which, I humbly conceive, ought, generally speaking, to be the guide of the court, and to limit its discretion in granting injunctions, at least where no very special circumstances occur—is, that such a restraint shall be imposed as may suffice to stop the mischief complained of, and, where it is to stay injury, to keep things as they are for the present.”

[The question, whether the Court of Chancery will interfere interlocutorily by injunction before the plaintiff's right is decided one way or the other by a trial, is

[*(i)* See judgments in *Imperial Gas Co. v. Broadbent*, 7 H. of L. 600.]

[*(h)* Per Sir *T. Plumer*, M.R. in *Wynstanley v. Lee*, 2 Swans. 363
[*(l)* 1 My. & Kee. 185.]

one depending upon the discretion of the court, having regard to all the circumstances, including the clearness, the extent and amount of the plaintiff's right, the injury which he is likely to sustain, his promptness in complaining, and a comparison of the injury likely to result to the plaintiff or defendant respectively, in case the ultimate issue should be in his favour, by reason of the refusal or the granting of the injunction, as the case may be (*m*).]

Remedy by
suit in equity.

If what is complained of be in its nature useful and necessary to the public, though productive of inconvenience to individuals, as a small-pox hospital, the court will not interfere by injunction (*n*);* so, too, where the injury is of a temporary nature only (*o*).

[(*m*) See 2 Daniell, Chancery Practice, 3rd edit. by Mr. Headlam, 1232; see also *A.-G. v. Sheffield Gas Consumers' Company*, 3 De Gex, M. & G. 304.]

(*n*) *Baines v. Baker*, Ambl. 158; 3 Atk. 750. In this case there does not appear to have been anything really amounting to a nuisance at all. See the comments of the Vice-Chancellor *Kindersley*

in *Soltau v. De Held*, 2 Sim., N. S. 149; and the judgment of the Vice-Chancellor *Wood* in *A.-G. v. Birmingham*, 4 Kay & Jones, 528, shows that if a nuisance be proved in fact, it is immaterial whether the nuisance is committed for the benefit of a private individual or many. See also *A.-G. v. Linton*, 2 Jur., N. S. 180.]

(*o*) *Coulson v. White*, 3 Atk.

* In the case of public bodies polluting rivers with sewage the court will not interfere for any fanciful injury to private property (*Lillywhite v. Trimmer*, 2 W. N. 141; 36 L. J., Ch. 525), or where the public are not seriously and materially injured (*Att.-Gen. v. Gee*, L. R., 10 Eq. 131), or where a nuisance is only anticipated. (*Att.-Gen. v. Kingston-on-Thames*, 11 Jur., N. S. 597.)

Public body.

But when the injury is substantial, the fact of the defendants acting for the benefit of the public makes no difference. Thus in *Att.-Gen. v. Colney Hatch* (L. R., 4 Ch. 146), an injunction was granted by Lord Hatherley, Chan., and Selwyn, L. J., reversing the decision of Malins, V.-C., against the governors of the Middlesex lunatic asylum, restraining them from sending the sewage of 22,000 inmates into a brook, which had made the water filthy in appearance, unfit for the drink

Att.-Gen. v. Colney Hatch.

Remedy by
suit in equity.

Where the right claimed is clearly shown to exist by contract, express or implied, and the contract can only

21; [see judgment in *A.-G. v. Sheffield Gas Consumers' Company*, 3 De Gex, M. & G. 304.]*

of men or cattle, and noxious to health from its effluvia. Lord *Hatherley* held that it was not a wrong which it was impossible to restrain, and that any difficulty they would have in otherwise disposing of their sewage would be met by giving them time to set themselves right, and that they had no more right to send it on their neighbour's land than one individual had to send his sewage on the land of another. *Att.-Gen. v. Birmingham* (6 W. N. 61) is to the same effect. As no complaint can be made until a nuisance actually exists and becomes serious, it is not laches, fatal to the remedy by injunction, to allow the drainage to continue for sixteen years, especially if it is authorized by the Legislature, on condition that it does not become a nuisance in gradually increasing. (*Att.-Gen. v. Leeds*, L. R., 5 Ch. 583.) But as the injunction is a preventive proceeding, and not for compensation, and promptness may be important, it is not within an act of parliament requiring a month's notice of proceeding. (*Att.-Gen. v. Hackney*, L. R., 20 Eq. 626.)

Temporary
nuisance.

*Att.-Gen. v.
Cambridge
Gas Co.*

* The decision in the Sheffield case was followed in *Att.-Gen. v. Cambridge Gas Consumers Co.* (L. R., 4 Ch. 71.) *Malins, V.-C.*, there granted an injunction against the defendants for taking up the streets of the town without parliamentary authority at the instance of a rival gas company, although the commissioners having the charge of the streets did not interfere, and it was not proved that any inhabitant had been inconvenienced, holding that the Sheffield case was controlled by *Reg. v. Longton* (29 L. J. (M. C.) 118), deciding it to be a nuisance at common law (L. R., 6 Eq. 282); but his decision was reversed by *Wood and Selwyn, L. JJ.*, on the ground that the injury was only temporary and trifling. *Wood, L. J.*, says, "Where the court interferes by way of injunction to prevent an injury for which there is a legal remedy, it does so upon two grounds, which are of a totally distinct character: one is that the injury is irreparable, as in the case of cutting down trees; the other that the injury is continuous, and so continuous that the court acts upon the same principle as it would in older times with reference to bills of peace, and restrains the repeated acts which could only result in incessant actions, the continuous character of the wrong making it grievous and intolerable. As an illustration of this class of case I may refer to *Soltau v. De Held*, where the annoyance from the ringing of the bell was in itself slight, but it was so continuous that the court thought fit to arrest the nuisance *brevi manu*, and save the complainant all further annoyance." (L. R., 4 Ch. 81.)

be effectually enforced by injunction, a Court of Equity will interpose (*p*).

Remedy by
suit in equity.

In *Martin v. Nuthin* (*q*), a bill was filed for an injunction against the churchwardens, &c. of Hammer-smith, "to stay the ringing of the five o'clock bell:" the court granted the injunction during the lives of the plaintiffs and the survivors of them, as it appeared that the defendants had agreed not to ring the five o'clock bell upon consideration that the plaintiffs should build a cupola to the church, which he accordingly did, and the bell was silenced for two years, after which the annoyance complained of took place (*r*).*

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*Martin v.
Nuthin.*

[(*p*) See *Tulk v. Moshay*, 2 Phil. 774; *Piggott v. Stratton*, 1 Johns. 341; and ante, pp. 88 and 323; *Hertz v. Union Bank of London*, 1 Jur., N. S. 127; *Fox v. Pursell*, 3 Sm. & G. 242; and as to the question how far the Court of Chancery is bound by

the effect of a verdict in matters of contract, see *Dickinson v. Grand Junction Canal Company*, 15 Beav. 260.]

(*q*) 2 P. Wms. 266.

[(*r*) See *Soltan v. De Held*, 2 Sim., N. S. 133.]

An offensive occupation which causes only an occasional or slight annoyance (*Swaine v. Great Northern Railway Company*, 10 Jur., N. S. 191; *Cooke v. Forbes*, L. R., 5 Eq. 166; *Luscombe v. Steer*, 17 L. T., N. S. 229), the obstruction of a right of way by carts being occasionally placed across it (*Durell v. Pritchard*, 1 Ch. 244), or by the occasional blasting of stone quarries near it (*Watkins v. Long Ashton*, 5 W. N. 15), and the inconvenience caused by crowds assembled round a place of public entertainment (*Inchbald v. Robinson*, L. R., 4 Ch. 388), will not be restrained by injunction.

* On this principle a perpetual injunction was granted against heating water contrary to agreement (*Tipping v. Eckersley*, 2 K. & J. 264); and against obstructing a road. (*Phillips v. Treeby*, 8 Jur., N. S. 711, 999; 8 Giff. 632.) And for a public nuisance contrary to agreement (*Nuneaton Local Board v. General Sewage Company*, L. R., 20 Eq. 127), If the act to be restrained is a breach of covenant, the amount of injury is immaterial. (*Lord Mannors v. Johnson*, 11 W. N. 3; *Att.-Gen. v. Mid Kent Railway Company*, L. R., 3 Ch. 100; *Wood v. Harrogate Commissioners*, 9 W. N. 132, 225.)

Remedy by
suit in equity.

*Robinson v.
Lord Byron.*

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In *Robinson v. Lord Byron* (*s*), where an injunction was prayed for against the defendant's using the water of a stream in any other manner than it had been used before, and it appeared that the defendant sometimes withheld the water, and at others discharged it in such quantities as to create a danger of sweeping away the plaintiff's mills; the injunction was granted as prayed, until an action then pending for the injury complained of was decided; and the right being found for the plaintiff, the injunction was made perpetual (*t*).

In *The Attorney-General v. Cleaver* (*u*), where the application was for an injunction to prevent the defendant carrying on his trade as a soap boiler and black ash manufacturer, the court refused the interlocutory injunction, but accelerated the trial of the indictment then depending.

*Crowder v.
Tinckler.*

So, also, in *Crowder v. Tinckler* (*x*), where the injunction was prayed to prevent the plaintiffs from using a certain building, when completed, as a powder magazine, which would be productive of great danger to the

(*s*) 1 Bro. C. C. 588.

[(*t*) See *Walter v. Selfe*, 4 D. & S. 315, where brick burning was restrained by injunction. The case was before 15 & 16 Vict. c. 86, but the defendant was content to abide by the decree of the court on the legal right without a trial at law. *A.-G. v. Luton*, 2 Jur., N. S. 180; *A.-G. v. Birmingham*, 4 K. & J. 528, where the discharge of filth into a stream was restrained. *Broadbent v. Imperial Gas Company*, 7 H. of L. Cases, 600; 7 De G., M. & G. 434, where a gas nuisance was restrained after the

legal right had been determined. *North Eastern Railway Company v. Elliott*, ante. p. 379, where works endangering right to easement of support were restrained. *Hunt v. Peake*, ante, p. 378, where works infringing natural right of support were restrained; and *Arcedeckne v. Kelk*, 2 Giff. 683; *Hertz v. Union Bank of London*, ib.; *Wilson v. Townend*, 30 L. J., Ch. 25, as to obstructions of ancient lights.]

(*u*) 18 Ves. 211.

(*x*) 19 Ves. 647.

Remedy by
suit in equity.

plaintiff's house, though no actual injury had been sustained, Lord *Eldon*, after considering and commenting on most of the previous decisions, and observing that there was contradictory evidence as to the right of the defendant to build a powder-mill upon the spot in question, and also as to the actual amount of danger to the plaintiffs from the erection, if completed, said, "Upon the whole, the proper course is, that the plaintiffs shall indict this building as a nuisance, and the defendants shall plead without traversing, so that it may be tried at the next assizes, and put the concern in such circumstances that it may be carried on without imminent danger. If they will undertake to carry it on so that no more powder shall be kept there than is necessary for the purpose of carrying on the trade, with liberty to apply on the result of the trial, that appears to be the best way to dispose of this case." Injunction dissolved accordingly (y).*

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[(y) In this case the Lord Chancellor sustained the bill, putting the defendant on terms with liberty to apply on the result of the trial; and it is, in fact, an

authority, that a private individual may sue in Chancery in respect of special injury from a public nuisance; see judgment of *Kindersley*, V.-C., 2 Sim., N. S. 150.]

* On the ground of imminent danger to the plaintiff, *Wood*, V.-C., in *Hepburn v. Lordan*, granted an interlocutory injunction to restrain the defendants from bringing any damp jute on their premises, and from permitting the jute which the defendants had placed there to remain in such quantities as to occasion danger to the adjoining premises of the plaintiff, the plaintiff undertaking forthwith to indict the defendants, and the defendants being allowed fourteen days to remove the jute. Jute, it was proved, was very inflammable, and that eight fires of a most calamitous nature had taken place within the bills of mortality, within the proceeding seven years, through the great difficulty of extinguishing it when once it was inflamed, and that it was liable to ignite spontaneously. On appeal, the injunction was dissolved by arrangement. (11 Jur., N. S. 132, 254; 2 H. & M. 345.)

Remedy by
suit in equity.

*Attorney-
General v.
Nichol.*

The principles which regulate the procedure of Courts of Equity, in applications of this nature, are fully laid down by Lord *Eldon* in *The Attorney-General v. Nichol* (z). The object of the information filed in that case was to restrain the defendant "from building up a certain wall, erection or building above the height of sixteen feet, and thereby obscuring and darkening the ancient lights of the Scottish Hospital."

The defendant, although he had received notice not to raise his wall above the height of sixteen feet, had carried it up to twenty feet, by which the windows of the hospital were darkened; and it appeared that, in case of a further elevation by him, the windows would be so obscured as materially to affect the value of the property. An action had been brought by the relators.

On a motion to dissolve the injunction, it was contended, that, to sustain an injunction, there ought to be an "irreparable injury for every useful purpose," such as a total deprivation of light, and not merely an obstruction, for which the party must be left to his common law remedy only; and the reasoning of Lord *Hardwicke*, in *The Fishmongers' Company v. The East India Company* (a), was relied on. For the relators it was urged, that no total interception of light was requisite, "if the effect is, that these ancient lights are darkened and obscured, and, if the building shall be carried higher, will be in a greater degree darkened and

(z) 16 Ves. 338.

(a) 1 Dick. 163.

In *Bannister v. Bigges*, the Master of the Rolls (Lord *Romilly*) granted an injunction against the use of a rifle ground until it was made free from danger to the plaintiff, his family and workmen. (11 Jur., N. S. 276.) See also *Reg. v. Lister* (1 Dear. & B. C. C. R. 209; 3 Jur., N. S. 570).

obscured, so much as materially to affect the value of the premises."

Remedy by
suit in equity.

"The foundation of the jurisdiction of this court," said Lord *Eldon*, "in interfering by injunction, is that head of mischief alluded to by Lord *Hardwicke*—that sort of material injury to the comfort of the existence of those who dwell in the neighbouring house, requiring the application of a power to prevent, as well as remedy, an evil, for which damages, more or less, would be given in an action at law. The question is, whether the effect (of the building) is such an obstruction as the party has no right to erect, and cannot erect without those mischievous consequences, which, upon equitable principles, should be not only compensated by damages, but prevented by injunction.

*Attorney-
General v.
Nichol.*

Principles
which guide
the court in
granting or
refusing relief.

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"Assuming, therefore, that, from circumstances of enjoyment, usage, or interest, some contract could be implied, that this defendant should not build upon the premises he occupies to the east of the hospital, and that an action on the case could be maintained upon that ground, that would not induce this court to interpose by injunction, unless the consequences of the act, which may be resisted as illegal, being a violation of the contract either expressed or implied, appeared to be such as should be not merely redressed, but prevented by application of the peculiar means of this court.

"I repeat the observation of Lord *Hardwicke*, that a diminution of the value of the premises is not a ground; and there is as little doubt that this court will not interpose upon every degree of darkening ancient lights and windows. There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained, or

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*Attorney-
General v.
Nichol.*

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an action on the case; which, however, might be maintained in many cases which would not support an injunction. These affidavits, therefore, stating only that the ancient lights will be darkened, but not that they will be darkened in a sufficient degree for this purpose, will not do."

His Lordship dissolved the injunction upon the defendant undertaking, in case a verdict should be against him in the action at law, to remove such building "as should be proved to affect the ancient lights in a material and improper degree."

*Wynstanley
v. Lee.*

In *Wynstanley v. Lee* (b), the plaintiffs sought to prevent the defendant from re-building a wash-house (originally of the height of about nine feet) to such an elevation as would obstruct the plaintiffs' ancient windows, and thereby materially diminish the value of their property.

Sir *Thomas Plumer*, M. R., said, "The first question is, whether, supposing the plaintiffs to have established their legal right to remove this building, begun by the defendant, they have entitled themselves to the preventive interposition of the court? The injury of postponing a building, which the party is entitled to erect, may not, in every instance, be equal to the injury of permitting him to proceed with one which is a nuisance. Cases arise in which courts of equity, seeing that the injury might be irreparable, as where loss of health, loss of trade, destruction of the means of existence, might ensue from erecting a building, would exercise its jurisdiction of preventing injury, without waiting the slow process of establishing the legal right, when

(b) 2 Swanst. 333.

delay would itself be a wrong. On the other hand, it may be perfectly clear that the plaintiff is entitled to succeed in an action, and yet a court of equity will not interfere by injunction. The plaintiff is bound to show, not only a legal right to the enjoyment of the ancient lights (c), but that, if the building of the defendant is suffered to proceed, such an injury will ensue as warrants the court to interpose, and at once take possession of the subject by injunction." His Honor was of opinion, that the plaintiffs were not entitled to an injunction, as both their right, and the actual amount of injury likely to be caused, were disputed by the defendant's affidavits: the expression, as to the injury which would result to the plaintiffs, was, "that the premises would be greatly injured and deteriorated;" and this allegation he held not sufficiently precise to warrant the interference by injunction. In addition to this, the custom of the City of London appeared to be a bar to the plaintiffs both at law and in equity.*

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suit in equity.

Wynstanley
v. Lee.

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In *Back v. Stacy* (d), the bill, and affidavit in support of it, stated the defendant was about to re-build his house "in such a manner as to darken and obstruct certain ancient lights and windows in the plaintiff's houses adjoining: that the eaves of the ancient roof of the defendant's house were not more than seventeen feet from the ground; that, according to the mode in which the defendant was re-building the premises, the roof would be eighteen feet higher than it was before; and that the effect of the alteration would be to darken

Back v. Stacy.

(c) *Weller v. Smeaton*, 1 Cox, L. J., Chanc. 25.]
102; [see *Wilson v. Townsend*, 30 (d) 2 Russell, 121.

* This is no longer an objection. (*Yates v. Jack*, L. R., 1 Ch. 295; *Dent v. Auction Mart Company*, L. R., 2 Eq. 238.)

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Back v. Stacy.
[433] entirely one of the plaintiff's ancient windows, which had formerly been altogether unobstructed, and to injure materially his other ancient windows, as well as to impede the free admission of light and air into his premises. The defendant had made considerable progress in the alterations complained of, and the timbers were fixed for erecting the new roof.

Lord *Eldon* granted the injunction upon an *ex parte* application.

Sutton v. Lord Montfort.

In *Sutton v. Lord Montfort* (e), an injunction was granted to restrain the building of a wall, which would obstruct certain ancient windows: upon a motion to dissolve it, Sir *L. Shadwell*, V.-C., after referring to the case of *The Attorney-General v. Nichol*, and remarking that the building would materially affect the comforts of the houses in which the windows were, said, "I have, therefore, a case before me in which, according to my opinion, upon the simple question of nuisance, the building, if completed, would be a nuisance, and in which it is not by any means clear that the Dean and Chapter of Westminster would have a right to erect the building proposed, and in which it appears that Lady Montfort may not have that right, even though the Dean and Chapter may have it. I think, therefore, the injunction should be continued, though the matter must be tried."*

(e) 4 Simons, 569.

Injunction
against ob-
struction of
light, &c. re-
fused when
no material
injury.

Johnson v. Wyatt.

* In *Johnson v. Wyatt* (9 Jur., N. S. 1833; 2 De G., J. & S. 18), the injunction was refused because the plaintiff did not prove that the building complained of was a nuisance to his house either as to light or air. *Turner*, L. J., says, "This question depends I think upon the degree in which the light and air coming to the plaintiff's house is or will be obstructed by the erection in question. It is unnecessary to say that this court certainly would not interfere by way of injunction in a

The mere fact that a nuisance is of a public nature will not in equity more than in law prevent individuals

Individuals sustaining special damage may apply to court for protection, though nuisance is public.

case in which no damages could be recovered at law. Perhaps it may be said, that this court would not interfere in a case in which, although damages might be recoverable at law, the amount to be recovered would be trifling or inconsiderable; but as this is a question on which, as applying to cases of nuisance, there has not been a unanimity of opinion in the court, I leave that point untouched. I think that at all events a plaintiff coming to this court for its interference in a case of this nature is bound to show that the obstruction to the light and air which he calls upon the court to restrain is such as will render the house occupied by him, if not of less value, less fit, or at least substantially less comfortable for the purposes of occupation."

On the same ground the injunction was refused in *Curriers' Company v. Corbett* (11 Jur., N. S. 719). *Turner, L. J.*, says, "It is not every impediment to the access of light or air which will warrant the interference of this court by way of injunction, or even entitle the party, alleging himself to be injured, to damages at law. In order to found a title to relief in equity or even at law in respect of such an impediment, some material or substantial injury must be established, and the onus of proving the injury must rest of course upon the plaintiff." In these cases, although the court thought that no nuisance was established, the bills were dismissed without costs.

Curriers' Company v. Corbett.

In *Clarke v. Clark* (L. R., 1 Ch. 16), the bill for an injunction was dismissed with costs because the plaintiff failed to establish a material obstruction of light and air. *Lord Cranworth* says, "The question is whether there has been such an interference with the light and air reaching the plaintiff's house as to cause material annoyance to those who occupy it. That the effect of the defendant's building is to render the plaintiff's room less cheerful, especially during the winter months, I do not doubt; the direct rays of the sun do not now reach it during that period of the year more than forty minutes in a day on an average, instead of about two hours and a half. But I cannot think that this is such an obstruction of light as to amount to a nuisance. What the plaintiff was bound to show was that the building of the defendant caused such an obstruction of light as to interfere with the ordinary occupations of life." *Durell v. Pritchard* (L. R., 1 Ch. Ap. 244), and *Robson v. Whittingham* (L. R., 1 Ch. Ap. 442) are to the same effect. In the latter case the plaintiff's house was let to a wood engraver and a law stationer, who both stated that there was a sensible diminution of light caused by the erection of the new building, that they were inconvenienced in their business thereby, and one of them said he was obliged to light the gas in his room earlier than formerly. *Turner,*

Clarke v. Clark.

Robson v. Whittingham.

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from applying to the court for protection, if they sustain special damage thereby. "It is going too far," said

L. J., observed, "The landlord who occupies the second floor of the house does not say to what extent he has been obliged to light the gas earlier than before, and in the case of *Durell v. Pritchard*, I think that there was evidence that they had been obliged to light the gas one hour earlier than they were before, and yet we thought that was not a case to interfere." (See observations of *Wood, V.-C., Dent v. Auction Mart Company*, L. R., 2 Eq. 253.) In this case and in *Curriers' Company v. Corbett*, the bills were dismissed without prejudice to the plaintiff's right to sue at law.

*Radcliffe v.
Duke of Port-
land.*

In *Radcliffe v. Duke of Portland* (8 Jur., N. S. 1007; 3 Giff. 702), the Duke of Portland, to secure the privacy of the lawn and garden behind Harcourt House, was erecting a glass screen, with open louvres for the admission of air, within thirty feet of the plaintiff's windows. It was part of his plan to have a moveable platform for keeping the glass clean on both sides. Part of the erection had been completed, but there was no evidence of any obstruction of light and air caused by the part so completed. The court refused an injunction, because there was no evidence, except as to opinion of what might happen, when there might have been evidence of what actually had happened.

*Jackson v.
Duke of New-
castle.*

In *Jackson v. Duke of Newcastle* (3 D., J. & S. 275), Lord Westbury refused an injunction, because the building complained of would not materially interfere with the existing use of the plaintiff's counting-house, though the plaintiff's premises might afterwards be applied to a purpose in which the proposed abridgment of light would operate materially to the prejudice of the owner of the premises. He held that it was not in every case in which an action can be maintained for the obstruction of light that an injunction will be granted by a court of equity. That something more was required than the amount of injury for which damages might be recovered at law. He dissolved the injunction, without prejudice to any future application, and gave the plaintiff the option of having the damages assessed in chancery or at law. And see also *Lanfranchi v. Mackenzie* (L. R., 4 Eq. 421).

**Injunction
granted when
injury mate-
rial.**

*Gale v.
Abbot.*

On the other hand, in *Gale v. Abbot* (8 Jur., N. S. 987), the plaintiff's back kitchen was lighted by a grating over an area which looked into the defendant's yard. The defendant converted his yard into a larder and glazed it with a skylight of rough glass, having in it a sliding panel to admit air. *Kindersley, V.-C.*, granted an injunction, thinking that the converting the yard into a larder with a skylight was such a nuisance as to occasion serious inconvenience to the plaintiff. "It was true the passage of light and air passing through the window of the back kitchen was of a sorry kind, but it was by that means alone

Lord *Eldon*, in *Crowder v. Tinckler*, "to say that if a plain nuisance is attended with particular and special Remedy by
suit in equity.

that a thorough ventilation existed to the plaintiff's house, and at all events, so far as the back kitchen was concerned, was of some value and so far of importance to the plaintiff. It was obvious that the yard, being covered by a skylight, tended materially to impede the passage of air."

In *Stokes v. City Offices Company* (11 Jur., N. S. 560), the plaintiffs were wholesale ironmongers at Clement's Lane, Lombard Street. The street was twenty feet wide, and the opposite buildings thirty-four feet high. The defendants were about to add twenty-four feet to the height of the opposite buildings. This additional height would render wholly useless reflectors used by the plaintiffs for the purpose of increasing their light, and abstract about one-third of the light. *Wood, V.-C.*, granted an injunction to restrain the defendants from building in front of the plaintiffs' house so as to darken, injure or obstruct any of the ancient lights or windows, &c. He observed, that it was a substantial case which the plaintiffs presented as regarded their business, which it was said would be seriously impeded by the proposed building. "It is quite true of late that the court has seen the difficulty that arises in dealing with such cases occurring in a large and improving town like the metropolis. Can we say that such a town or any other town of that kind is to be condemned to remain, by the interference of this court, with a shabby and low kind of building, when buildings of a much greater magnitude would be carried out by enterprising persons? It seems to me to be to a question very well deserving the consideration of the legislature as to whether there could not be some general act passed by which arrangements could be made and adjustments entered into, either through the medium of a jury or otherwise as the case might be, for the purpose of enabling such improvements to be carried out. In the meantime until that is done I do not feel myself in a condition to say that large improvements ought to be carried on by companies, either for the good of the public or themselves or both, at the expense of others. The legislature does not allow the meanest house to be taken for the purpose of a railroad, however great the improvement may be, without the sanction of an act of parliament, and I do not see how this court can take upon itself to dispose of property. The legislature has made this light and air, at the end of twenty years, to become positive property on the part of those in the enjoyment of the easement: how can I possibly take away that property?"

In *Yates v. Jack* (L. R., 1 Ch. 295), the plaintiffs carried on the business of merchants at Lower East Smithfield, a street twenty-five feet two inches wide; the opposite buildings were some thirty-two and some twenty feet high. The defendant proposed to erect buildings *Yates v. Jack.*

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damage to an individual, producing irreparable damage, that individual shall not be at liberty to come here

opposite the plaintiffs', set back six feet, but ~~sixty~~ sixty-seven feet high. *Wood*, V.-C., decreed that the plaintiffs were entitled to the free access of air and light to such an extent as would enable them to enjoy their messuage for the purpose of their business, without any material diminution of their former use and enjoyment, and restrained the defendants from building to a greater height than thirty-five feet. On appeal Lord *Cranworth* said, "The evidence has led me to the conclusion that the erection of the new buildings will materially interfere with the quantity of light necessary or desirable for the plaintiffs. I desire, however, not to be understood as saying that the plaintiffs would have no right to an injunction unless the obstruction of light were such as to be injurious to them in the trade in which they were engaged. The right conferred and recognized by the stat. 2 & 3 Will. 4, c. 71, is an absolute indefeasible right to the enjoyment of light, without reference to the purposes for which it has been used. Therefore, even if the evidence satisfied me, which it does not, that for the purpose of their present business a strong light is not necessary, and that the plaintiffs will still have sufficient light remaining, I should not think the defendant had established his defence unless he had shown that, for whatever purpose the plaintiffs might wish to employ the light, there would be no material interference with it." He held the plaintiffs entitled to an injunction restraining the defendant from erecting any building so as to darken, injure or obstruct any of the ancient lights as they were enjoyed previously to the taking down by the defendant of his building on the opposite side of the street, and also from permitting to remain any buildings which would cause any such obstruction.

Dent v.
Auction Mart
Company.

In *Dent v. Auction Mart Company* (L. R., 2 Eq. 238) there were three suits: one by Messrs. Dent, another by Messrs. Pilgrim, and a third by the reversioners. The defendants were about to erect their buildings higher and nearer than the former buildings, so as to intercept a large area of the sky as seen from the upper portion of Messrs. Dent's windows, and to shut up the staircase windows, which, when opened, admitted air, as in a box with the lid off, by a wall eight or nine feet distant and about forty-five feet high, and in that circumscribed space to place three water-closets, and in Messrs. Pilgrim's case to diminish the light very considerably. *Wood*, V.-C., held, that where substantial damages would be given at law as distinguished from some small sum of 5*l.*, or 10*l.*, or 20*l.*, the Court of Chancery would interfere. But that pecuniary loss was not essential. The Vice-Chancellor says, "I think it probable that Messrs. Pilgrim, by carrying on business by gas light all day, would not lose a single client, but they would carry it on

unless the Attorney-General chooses to accompany him" (f).

Remedy by
suit in equity.

(f) 19 Ves. 621; vide etiam *Mayor of London v. Bolt*, 5 Vesey, 129; *A.-G. v. Forster*, 2 My. & Cr. 123; [and the judgment in *Soltau v. De Held*, 2 Sim., N. S. 133, containing an elaborate state-

ment of the authorities, and showing that a private person may maintain a bill if he can show special damage to himself arising out of a public nuisance.]

much less beneficially to themselves, whether in discharging their duties to their clients on the one hand, or in preserving their health and their facility of transacting business on the other." In a subsequent part of his judgment he says, "The question comes simply back to this, Is there substantially an interference with comfort? Is there a substantial diminution of light for carrying on work?" He also held, that there was no difference between the right to protection of a person residing in town and of a person residing in the country, and that a difficulty created by some observations of Lord *Oranworth* to that effect, in *Clarke v. Clark*, and *Knight Bruce*, L. J., in *Hobson v. Whittingham* (12 Jur., N. S. 41), was removed by the decision in *Yates v. Jack*, and that the obstruction to the circulation of air to Messrs. Dent's staircase windows was such an interference with air as the court would recognize as a nuisance. In Dent's case there was a perpetual injunction, restraining the defendants from erecting any building so as to darken, hinder or obstruct the free access of light and air to the ancient windows of the plaintiffs, as such access was enjoyed previously to the taking down by the defendants of the buildings which formerly stood on the ground of the defendants adjoining the property of the plaintiffs, and to remove the buildings, if any, which materially interfered with the access of light and air, under the direction of a judge in chambers. The defendants to have liberty to apply to a judge at chambers, but not so as to infringe the injunction. In *Pilgrim's* case there was a similar injunction, leaving out air." (See *Aynsley v. Glover*, L. R., 18 Eq. 552.)

In *Martin v. Headon* (L. R., 2 Eq. 425), *Kindersley*, V.-C., agreed with *Wood*, V.-C., in *Dent v. Auction Mart Company*, that with respect to the right of the owner of ancient lights to be protected against an obstruction to light and air, there was no distinction between houses in town and houses in the country. The plaintiff having proved that, by reason of the diminution of light caused by the defendant's building, he was obliged to remove his workman to another room, it appeared to his Honor that the defendant's building was a considerable and serious obstruction of light to the plaintiff's workshop, and had

*Martin v.
Headon.*

Remedy by
suit in equity.

Thus, too, in the recent case of *Spencer v. London and Birmingham Railway Company (g)*, it was held

(g) 8 Simons, 193; see also *poration v. Chorley Waterworks*,
Sampson v. Smith, *ibid.* 272; 2 De G., M. & G. 852; *Ware v.*
[and see *A.-G. v. Birmingham*, *Regent's Canal Company*, 2 De G.
4 K. & J. 528; *A.-G. v. Luton*, 2 & J. 212; *Cook v. Mayor of Bath*,
Jur., N. S. 180;] *Liverpool Cor-* L. R., 6 Eq. 177.

therchy occasioned serious impediment to the carrying on of the plaintiff's business as it had previously been carried on. He says, "As a matter of principle it appears to me that the easement of light, that is, the right which a man has to receive into his ancient window a certain supply of light over or across another man's land, is just as much part of his property as his land or his house, and is just as much entitled to protection as any other property. It may be, indeed, that the damage done by the neighbour's act is so trivial as not to justify the interference of the court. But whenever it is shown that the comfort or enjoyment of a man or his family in the occupation of his house is seriously interfered with, and still more when he is prevented from carrying on his business with the same degree of convenience and advantage as theretofore by reason of the abstraction of light caused by his neighbour's act, there is sufficient ground for the interference of this court. (See the cases ante, 328—331, 608, 609, 637—639.)

If a nuisance has been committed and the plaintiff is entitled to an injunction, it is no answer that the defendant has by acts done voluntarily endeavoured to mitigate or prevent it. Thus, in *Dent v. Auction Mart Company* (L. R., 2 Eq. 251), it was held that the defendants placing glazed tiles as reflectors was no answer to a claim for an injunction; *Wood*, V.-C., observing, "A person who wishes to preserve his light has no power to compel his neighbour to preserve the tiles or a mirror, which might be better, or to keep them clean; nor has he covenants for the purpose which will run with the land, or affect persons who may take without notice, and therefore it is quite preposterous to say, Let us damage you, provided we apply such and such a remedy." (See also *Radcliffe v. Duke of Portland*, 8 Jur., N. S. 1007; 3 Giff. 702.)

Fouling water.

If a definite amount of injury can be traced to the defendant, it is no answer to an injunction that the water is also fouled by others, especially if the nuisances by the others can be bought off or restrained. (*Crossley v. Lightowler*, L. R., 3 Eq. 288; 2 Ch. 481.)

Nuisance permanent or continuous.

An injunction for fouling water, or other analogous nuisance, will not be granted when the injury is temporary or trifling, but will when it is permanent and serious; and in determining whether it is serious or

that where individuals sustained injury from a public nuisance, quite distinct from that which was inflicted

Remedy by
suit in equity.

not, regard must be paid to the consequences that may flow from it. Regard must be had, not merely to the comfort and convenience of the occupier of the estate, which may only be interfered with temporarily, and in a particular degree, but also to the effect of the nuisance on the value of the estate, and the prospect of dealing with it to advantage. (*Goldsmid v. Tunbridge Wells Commissioners*, L. R., 1 Ch. 354, per *Turner*, L. J.; S. C., 1 Eq. 161.) Upon the above grounds, and also upon the ground that the water of the brook was unfit for the use of the tenants and occupiers of the plaintiff's estate, an injunction was granted at suit of a tenant for life against sending sewage into the brook.

In the case of the pollution of streams, the injunction is granted because the injury is continuous, and to prevent repeated actions, though the damage recoverable may be merely nominal. (*Clowes v. Staffordshire Potteries Waterworks Company*, L. R., 8 Ch. 142.)

*Clowes v.
Staffordshire
Potteries.*

(On the same principle, injunctions were granted where the nuisances complained of were smoke and noise from carrying on the trade of an iron factory (*Crumph v. Lambert*, L. R., 3 Eq. 409), and where they arose from a powerful band of music, and the noise and glare of fireworks, and risk from rocket-sticks falling in the plaintiff's garden and on his greenhouses, and the collection of crowds of disorderly persons in conducting public entertainments at tea-gardens. (*Walker v. Brewster*, L. R., 5 Eq. 25; *Inchbald v. Robinson*, L. R., 4 Ch. 388.) These frequently recurring nuisances were held sufficiently serious and permanent to warrant the interference of the court by injunction. And for burning bricks within one hundred yards of the plaintiff's residence. The evidence of the plaintiff and his witnesses being positive as to existence of smoke and offensive smells arising from the defendant's kiln, and that they were a nuisance to him, outweighed the negative evidence of the defendant's witnesses that they had not smelt any thing offensive. (*Boreham v. Hall*, 5 W. N. 57.) And for obstruction of a way to an inn-yard, from the loading and unloading of waggons by several persons, though the act of one would not have warranted an injunction. (*Thorpe v. Brumfitt*, L. R., 8 Ch. 650.)

Nuisances frequently re-
curring.

In *Tipping v. St. Helen's Smelting Company* (L. R., 1 Ch. 66), a suit for an injunction against injuring the plaintiff's land by smoke from the defendant's works, after judgment had been recovered at law, *Knight Bruce*, L. J., said, that after judgment has been obtained at law, and substantial damages given, it is almost as of course that a court of equity should grant an injunction to prevent the continuance

After judgment.

Remedy by
suit in equity.

by it on the public, a bill might be filed by those individuals to be relieved from the nuisance.

of the nuisance. (See also *Imperial Gas Company v. Broadbent*, 7 H. Lds. 612, per Lord *Kingsdown*.) The same effect is given to a judgment on an indictment. It is no ground of refusing an injunction that an appeal is pending on the judgment, if the court has no doubt of its justice. (*Attorney-General v. Bradford Canal*, L. R., 2 Eq. 71; see also per *Wood*, V.-C., *Attorney-General v. Kingston-upon-Thames*, 11 Jur., N. S. 600; and *Lingwood v. Stormarket Company*, L. R., 1 Eq. 79.)

Form.

In these cases the injunction is to restrain the continuing or repetition of any acts, similar to those complained of, to the injury of the plaintiff. (*Lingwood v. Stormarket Company*, L. R., 1 Eq. 77, 336; *Crumph v. Lambert*, L. R., 3 Eq. 414.) In *Walker v. Brewster* (L. R., 5 Eq. 34) the injunction was more general—viz., to restrain the defendant from continuing to hold, or permitting to be held, any public exhibition, or other entertainment, whereby a nuisance might be occasioned to the annoyance and injury of the plaintiff.

Plaintiff's
interest.

An injunction to restrain an obstruction to light was granted at the suit of a yearly tenant (*Simper v. Foley*, 2 J. & H. 555), and of a tenant whose time had expired after the nuisance, and who had agreed to renew. (*Gale v. Abbot*, 8 Jur., N. S. 987) In *Inchbald v. Robinson* (L. R., 4 Ch. 395), an injunction was granted at the suit of a yearly tenant who had been many years in his house, *Selwyn*, L. J., saying that he was not to lose his rights because he was only a yearly tenant, still it was a circumstance to be considered; and in *Jones v. Chappell* (L. R., 20 Eq. 543), *Jessel*, M. R., said, that, so far as he was aware, it had never been decided that a weekly tenant could not have an injunction; and if a weekly tenant and his landlord were to join in a suit to restrain a nuisance, he would not find the slightest difficulty in granting an injunction. In *Dent v. Auction Mart Company* (L. R., 2 Eq. 247), *Wood*, V.-C., says, "I may suggest a case in which the court would probably not interfere (not merely where the right is of short duration, for I have interfered in cases of very short duration with reference to the obstruction of light), but where the whole of the property is about to cease immediately, as, for instance, in the case of a notice given under a railway act to take a house, when the house is about to be destroyed and razed to the ground in two or three days time."

The owner of a house, who has no intention of residing there, may have an injunction against an obstruction to the windows. (*Wilson v. Townend*, 6 Jur., N. S. 1109; 1 Drew. & Sm. 324); and a reversioner (*Mercers' Company v. Auction Mart Company*, L. R., 2 Eq. 238; *Carriers' Company v. Corbett*, 11 Jur., N. S. 719; 2 Drew. & Sm. 35.)

A distinction has been taken in some cases between those injunctions which merely prevent the doing of an Injunction on motion.

In *Jacomb v. Knight* (9 Jur., N. S. 529; 32 L. J., Ch. 601), where a yearly tenant under notice to quit claimed an injunction against his landlord to restrain a slight obstruction to light and air, which the Master of the Rolls granted; the Lords Justices dismissed the bill without costs, on the ground that, considering the nature and extent of the plaintiff's interest, and the balance of inconvenience on the one side and the other, there was not such a plain case as would render an injunction necessary, especially as the plaintiff could recover compensation in damages.

An injunction against a nuisance from keeping offensive water in a canal was granted, as well against the lessees, by whom the nuisance was committed, as against the company, their landlord, who had indemnified them, and intended to continue the nuisance at the expiration of the term. (*Att.-Gen. v. Bradford Canal*, L. R., 2 Eq. 71.) Against whom.

Against a fluctuating body, such as a highway board, an injunction to stop sewers made by their predecessors cannot be issued, but it can to prevent their increase. (*Att.-Gen. v. Richmond*, L. R., 2 Eq. 306.)

Where the occupier licenses another to commit a nuisance, the injunction may go against the occupier. (*White v. Jameson*, L. R., 18 Eq. 303.) An agent in the commission of a nuisance may be made party to a suit for its removal, but is not a necessary party. (*Heugh v. Earl of Abergavenny*, 9 W. N. 193.) But if a party liable for a nuisance in a mine has *bona fide* parted with his interest before the injunction is applied for, an injunction will not be granted against him. (*Matthews v. King*, 3 H. & C. 910.)

Where an interlocutory injunction is granted, costs ought not to be given against the defendant until after the trial of the cause. (*Grindley v. Booth*, 3 H. & C. 539.) Costs.

Where the evidence is conflicting the court sometimes appoint a scientific person to report to them. This was done in *Kelk v. Pearson* (L. R., 6 Ch. 810) and in *Cartwright v. Last* (11 W. N. 60), where the complaint was of an obstruction to light. But in *Att.-Gen. v. Colney Hatch* (L. R., 4 Ch. 146), where the nuisance was satisfactorily proved, the court refused to refer the merits of the case to an engineer. In *Att.-Gen. v. Merthyr Tydfil* (5 W. N. 148), *Giffard*, L. J., referred to an engineer to report as to how and when the nuisance could be rectified. Reference to expert.

There are instances where the judge has himself visited the premises affected by an obstruction of light or a nuisance from noise before granting an injunction, though Lord Westbury doubted whether he ought to do so, and was not bound to act on the affidavits. (*Jackson v. Duke of Newcastle*, 10 Jur., N. S. 688; 3 De G., J. & S. 275; *Manser v. Bowers*, 7 W. N. 163.) Inspection by judges.

Remedy by
suit in equity.

act, and those the consequence of which, either directly or indirectly, will be to compel a party to do some act, as to fill up a ditch (*h*) or pull down a wall (*i*); the former being granted on motion, the latter on decree only.

This distinction, however, though recognized, does not appear to have been strictly attended to: indeed, in one case (*h*), Lord *Eldon*, though he refused the order as prayed, “to restrain the defendant from continuing to keep certain works out of repair,” purposely made an order in such a form as to have the same effect, by making it difficult for the defendant to avoid completely repairing his works.

Blakemore v.
Glamorgan
Canal Navigation.

[435]

“I take leave,” said Lord *Brougham*, in commenting on this case, in his judgment in *Blakemore v. Glamorganshire Canal Navigation* (*l*), “to agree with Lord *Lyndhurst* in the opinion, that, if this court has this jurisdiction, it would be better to exercise it directly and at once; and I will further take leave to add, that the having recourse to a round-about mode of obtaining the object seems to cast a doubt on the jurisdiction.” The question of jurisdiction his Lordship does not expressly decide, “although,” he continues, “we have no right to say there is not a precedent for taking a similar course here; yet surely we may pause, and, without denying the jurisdiction, decline to exercise it.”*

(*h*) *Robinson v. Lord Byron*,
1 Bro. C. C. 580.

(*h*) *Lane v. Newdigate*, 10 Ves.
192.

(*i*) *Ryder v. Bentham*, 1 Ves.
sen. 543.

(*l*) 1 My. & Kee 184. [See the
judgment in *Lunley v. Wagner*,
1 De Gex, M. & G. 604.]

Mandatory
injunction.

* The court will not interfere by way of mandatory injunction, except in cases in which extreme, or, at all events, very serious, damage will ensue from its interference being withheld. (Per *Turner*, L. J.,

[In some cases, although the legal right has been established, the Court of Chancery refuses to interfere, on the ground of the acquiescence of the plaintiff in the mischief complained of. *Wood v. Sutcliffe (m).*]

Remedy by
suit in equity.

*Blakemore v.
Glamorgan
Canal Navi-
gation.*

[(*m*) 2 Sim., N. S. p. 169. See further, as to acquiescence, *Rochdale Canal Company v. King*, 2 Sim., N. S. 78; *Bankhart v. Houghton*, 27 Beav. 425; *Ware v. Regent's Canal Company*, 3 De G. & J. 212; *A.-G. v. Birmingham*, 4 K. & J. 528; *Broadbent v. Imperial Gas Light Company*, 7 De G., M'N. & G. 436; 7 H. of L. 600; and see also *anto*, p. 76.]

Durell v. Pritchard, L. R., 1 Ch. 250.) The power to issue a mandatory injunction, to compel a defendant to restore things to the condition in which they were before he began to build, should be attended with the greatest possible caution. It should be confined to cases where the injury done to the plaintiff cannot be estimated or sufficiently compensated by pecuniary payment. On this principle, Lord Westbury, in *Isenberg v. East India House Estate Company* (10 Jur., N. S. 221; 33 L. J., Ch. 392), refused an injunction to pull down a building which obstructed the plaintiff's light, and directed an inquiry as to damages. (See also *Jacomb v. Knight*, 9 Jur., N. S. 529; 32 L. J., Ch. 601). In *Carriers' Company v. Corbett* (11 Jur., N. S. 719), Turner, L. J., said, that the jurisdiction to order a building which had been completed to be pulled down, so far as it impeded the progress of the air and light, had, so far as he knew, never been assumed or exercised. It has been exercised when the objectionable building is in progress. (*Dent v. Auction Mart Company*, L. R., 2 Eq. 238; *Lawrence v. Austin*, 11 Jur., N. S. 576.)

Mandatory
injunction.

It is no bar to relief by mandatory injunction that the damage is complete before bill filed. (*Durell v. Pritchard*, L. R., 1 Ch. 244.) If the damage is complete, the court does not interfere by way of injunction until the right has been determined. (*Attorney-General v. United Kingdom Electric Telegraph Company*, 30 Beav. 287; *Deere v. Guest*, 1 Myl. & Cr. 516.)

Lord Selborne, in *City of London Brewery Company v. Tennant* (L. R., 9 Ch. 219), said, that he was not prepared to assent to the opinion that in every case in which a building has been completed before the filing of the bill, the court is powerless. "The court has power, if it thinks fit, to grant a mandatory injunction, that is, an order directing the removal of the building. We know of course the court is not in the habit of doing so except under special circumstances, but those special circumstances may exist." A mandatory injunction was granted to pull down a building which obstructed the plaintiff's

When granted.

Mandatory injunction.

light where the plaintiff had promptly objected, and the defendant knew he was in the wrong. (*Smith v. Smith*, L. R., 20 Eq. 500.) Also, in the case of a mischievous and irreparable trespass by one railway company erecting a building to obstruct a way to the station of another, for the purpose of diverting the traffic. (*London and North Western Railway Company v. Lancashire and Yorkshire Railway Company*, L. R., 4 Eq. 174.) Also to take up waterpipes, laid in a highway at the instance of the owner of the soil, on the ground that the act was done quickly and by surprise on the plaintiff, and was an admitted trespass, done without lawful justification or excuse, a deliberate and unlawful invasion of the plaintiff's right, and in the nature of a continuing trespass or series of trespasses. (*Goodson v. Richardson*, L. R., 9 Ch. 221.)

When not.

On the other hand, where a vinery was erected in breach of a covenant not to erect buildings, the court declined to grant a mandatory injunction, considering that no substantial annoyance had been occasioned to the plaintiff; no substantial injury done to his property. It was held that a declaration was sufficient for the purpose of protecting the title. Power was not given to the plaintiff of doing such an unreasonable and an unneighbourly act as the taking down the vinery, which was a great convenience to the defendant, and its removal would not confer any benefit on the plaintiff. (*Bores v. Law*, L. R., 9 Eq. 636.) In a light and air case, where the plaintiff had notice of the defendant's intention to build in January, and made no complaint until November, and the building was carried up to a considerable height and substantially completed before the bill was filed, *Hall*, V.-C., acting upon the authority of *Isenberg v. East India Estate Company*, *Durell v. Pritchard*, *Curriers' Company v. Corbett*, and Lord Selborne's judgment in *City of London Brewery Company v. Tennant*, declined to issue a mandatory injunction. (*Lady Stanley of Alderley v. Earl of Shrewsbury*, L. R., 19 Eq. 616.)

An injunction prohibitory in form, but mandatory in effect, was granted against permitting a communication between the mines of the defendant and the plaintiff to continue open and water to flow through, the intention being to compel the defendant to close the communication. (*Earl of Maccborough v. Bower*, 7 Beav. 127.) A similar injunction on a board of health, against permitting sewage to flow into a river, was enforced by sequestration. (*Spokes v. Banbury Board of Health*, L. R., 1 Eq. 42.)

A mandatory injunction may be granted on motion before the hearing of the cause. (*Beadel v. Perry*, L. R., 3 Eq. 465; *Hervey v. Smith*, 1 K. & J. 328.) But will not be granted except under very special circumstances. (*Westminster Brymbo Coal Company v. Clayton*, 36 L. J., Ch. 476.)

Injunction.

The owner of an easement may lose his right to the interference of a court of equity by laches. The Lord Chancellor, in *Williams v. Earl of Jersey* (1 Cr. & Ph. 91), says, "A party seeing a nuisance in progress, and not interfering to prevent it, may forfeit his right to assistance from a court of equity." In *Jones v. Royal Canal Company* (2 Molloy, 319), it is said, "To have a work erected at a great expense, whether private or public, removed by this court as a nuisance, the person complaining should give notice not to proceed, otherwise the court will leave the complainant to law." And when the plaintiff sought to restrain a nuisance from an offensive trade, the injunction was refused, because he saw the manufactory building, and made no objection to it. (*Wood v. Sutcliffe*, 2 Sim., N. S. 163; *Bankart v. Houghton*, 27 Beav. 425.) Where an obstruction to light and air had existed nearly six years before the bill was filed, and the plaintiff and his servants could never have gone into the stable without perceiving it, the bill was dismissed. (*Gaunt v. Finney*, L. R., 8 Ch. 14.) If the building is erected without his knowledge, he may sue for an injunction after its completion. (*Durell v. Pritchard*, L. R., 1 Ch. 241.) Where the defendants' solicitor wrote that should their premises at any time become a nuisance, they were willing to assume that the plaintiffs were not damaged in their rights by delay, it was held that the defendants could not set up the laches of the plaintiff. (*Baxter v. Dower*, 10 W. N. 11.)

Mere delay may amount to laches, and deprive the plaintiff of his right to an injunction. *Wicks v. Hunt* (John. 372), *Cooper v. Hubbuck* (7 Jur., N. S. 457; 30 Beav. 160), are cases where delay had this effect; *Imperial Gas-Light Company v. Broadbent* (7 H. Lds. 600), *Johnson v. Wgati* (9 Jur., N. S. 1333; 2 De G., J. & S. 18), and *Turner v. Mirfield* (31 Beav. 390), where it had not. The delay, it seems, must be such as to induce the defendant to suppose that the plaintiff had withdrawn his objection to the nuisance complained of. (See *Cocks v. Romaine*, 14 L. T., N. S. 390.)

There may be cases, such as Lord Eldon put, in the *Attorney-General v. Johnson* (2 Wils. C. C. 87), in which laches may be imputed to the public through the medium of the Attorney-General; cases of large expenditure incurred in buildings which are seen by the public, and are allowed to go on without the slightest complaint on the part of any one. (Per Wood, V.-C., *Attorney-General v. Bradford Canal*, L. R., 2 Eq. 81.) But in the case of a canal company causing a nuisance by keeping offensive water in their canal, or of a board of health fouling a stream by sewage, persons are obliged to wait for a considerable time before they can come to the court. Their waiting to see whether the evil will diminish is not laches. (*Attorney-General v. Bradford Canal*, L. R., 2 Eq. 71; *Goldsmid v. Tunbridge Wells Commissioners*, L. R., 1 Eq. 161; 1 Ch. 349; *Attorney-General v. Leeds*, L. R., 5 Ch. 583; *Attorney-General v. Halifax*, 4 W. N. 202.)

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